SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 18

UTAH PIE COMPANY, PETITIONER,

vs.

CONTINENTAL BAKING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRYANT K. RIGBY called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows.

Direct examination.

By Mr. Alioto:

Q. What is your name, Mr. Rigby?

A. Bryant K. Rigby.

Q. And what is your relationship to the two men who testified yesterday?

A. They are both my younger brothers.

Q. So there are three brothers and one cousin, the four of you pretty much run the plant today, are you?

A. That is correct.

Q. How long have you been in this plant, Mr. Rigby?

A. Well, I actually started work similar to the other two, when we were in grammar school, working part time on Saturdays, and holidays, and so forth.

Q. And then there came a time, Mr. Rigby, when you worked full time in the plant?

A. Yes. I believe I actually started working full time in 1956.

Q. Would you be good enough to tell us the nature of [fol. 465] the work that you have done in the plant over all those years?

A. Well, actually, at the present time I am plant superintendent, but previous to this time I have worked at most every phase of production in the production of frozen pies, except the actual cooking of the fruit filling, but anything else I have been in the complete operation from time to time.

Q. Mr. Rigby, we would like you to tell us how many men were employed in the plant in 1961 and the years immediately prior to that.

A. We have 18 employees.

Q. I said "men." That includes men and women, is that correct?

A. Men and women.

Q. Eighteen employees. And of the 18, how many are members of the family?

A. Nine.

Q. Nine. And the others are non-members?

A. Yes.

Q. Of the members of the family, who is in charge of sales?

A. Gaylen Rigby.

Q. That is Gaylen Rigby, your cousin?

A. Yes.

Q. You and your brothers are basically in charge of the inside plant and production work, is that correct?

A. That is correct.

Mr. Alioto: We have no further questions of this witness.

Cross examination.

By Mr. Lamb:

Q. Mr. Rigby—

A. Yes, sir.

Q. You are the cost expert of the company?

A. I have done the costing work which has been done for the company, yes. I wouldn't say I was an expert, no.

Q. Will you tell me where you studied cost accounting?

A. Well, I have never actually studied cost accounting. I have had a little bit of accounting at the University of Utah.

Q. Did you then devise your own accounting system?

A. Yes.

Q. Will you describe that system for us. How do you keep your cost accounting records?

A. Well, actually, I don't have any cost accounting records. The only costs we have are costs which I have figured to give the company some idea what our costs were. We didn't actually have any actual cost or paper work on this until 1960.

• • • • • • •

Q. Now, when you determine that your costs of direct labor, indirect labor, materials, transportation, advertising, in the aggregate, your total costs, when that goes up, do you then reflect that increase in cost in your selling prices?

A. No, generally not. We try to keep our selling costs [fol. 466] pretty much the same. Sometimes we do—I mean, it just depends on how drastically they do change.

Q. How do you determine your selling prices? Are they based upon costs or are they based upon—

A. Well—

Q. Excuse me, go ahead.

A. Well, that is hard to say. I don't really actually know how our selling prices were determined. The selling prices were set before I ever did any of this costing work, and from time to time our selling prices have gone down due to the competition which we have had in the market.

Q. In other words, you set your selling prices based upon the competition in the market, rather than upon the cost that you project?

A. Well, it's based on, at times it has been based on the competition in the market, if we were forced to meet a certain price in order to maintain our business.

Q. Are you familiar with your competition?

A. No, not too much. That would be more the work of the salesmen.

Q. Do you know the names of the various frozen pie companies that operate in this market?

A. No. I know some of them. I don't know them all, no. I haven't had any work with the stores or the wholesale houses at all. I'm not familiar with that.

Q. Do you recall the name Pictsweet?

A. I've heard the name Pictsweet. I've seen their pie.

Q. Bradley?

A. No, I don't know as I've ever seen any Bradley pie. Now, it may come under a different label. I don't know.

Q. Johnston?

A. I've seen Johnston to an extent.

Q. Mary Elizabeth?

A. Yes.

Q. Frigid Dough?

A. Yes.

Q. In fact, isn't it true that there are a number of frozen pie producers that sell in this market, in addition to the three defendants in this case?

A. Well, there are some others who have sold in here. Whether they're still in here or not, I don't know.

Q. When you stated that you meet competition in this market, is it true that you meet the competition of pie manufacturers other than these three defendants?

A. Well, there, as a matter of definition what competition is, there have been some pies come in there which in my opinion are low quality pies that haven't sold too well in the market.

Q. If a low quality pie comes in here—describe a low [fol. 467] quality pie to me, which you regard as a low quality pie.

A. Well, it would be—that's a matter of taste, I imagine. Light weight, poor crust, poor filling.

Q. Does the Utah Pie Company attempt to compete with those pies pricewise? Do you meet their price?

A. If it's necessary.

Q. If it's necessary, you meet the price—

A. If we're forced to in order to maintain our business.

Q. Are you ever the leader in the price reductions in the market?

Mr. Alioto: Submit, if your Honor please, the witness has testified he has nothing to do with sales, and therefore, he can only be calling for hearsay.

The Court: Sustained.

By Mr. Lamb:

Q. Mr. Rigby, you are familiar with the fact that the Safeway people require their suppliers to cost justify if there's a difference in price between their regular product and the product sold to Safeway?

A. No, I am not.

Q. Have you ever been told by the Safeway Company that there was an act known as the Robinson Patman Act?

A. Yes, they did mention that.

Q. And that possibly you might be in violation of that act unless you—

Mr. Alioto: Submit, if your Honor please, what he was told by the Safeway Company with respect to the relevance of the Robinson Patman Act can have no conceivable relevance in this action.

The Court: Sustained.

By Mr. Lamb:

Q. Mr. Rigby, who would it be in your company that would handle the cost justification, in order to justify the difference in the selling price of the Utah Pie Company, let us say, as against the Bel Air Pies that you sell to Safeway?

A. Who would—

Q. Who in your company would be responsible for calculating whether or not the cost differences were reflected in savings?

A. Well, as far as the calculation of the Safeway costs which were required of us by Safeway due to a percentage breakdown which they give us, I figure the beginning costs which were quoted to Safeway.

[fol. 468] Q. Are your selling prices to Safeway different than your selling prices on a comparable pie to other customers?

A. Do you mean the Bel Air Pie?

Q. Yes. Well, let's be a little more—

A. What do you mean by a comparable pie? The Safeway formula is different from ours, yes.

Q. Is your Utah Pie formula close to the Safeway formula?

A. There's a difference. I don't know what you mean—

Q. They're both 24-ounce pies?

A. They're both 24-ounce pies, yes.

Q. Does the Safeway formula require a higher or a lower grade of fruit?

A. To the best of my recollection, they required at the time a vacuum packed apple, which we were using.

Q. That's the same, in other words?

A. Yes, as far as I can remember. I believe it was—

Q. Did you use different flour?

A. No, sir.

Q. You used the same flour?

A. The same flour.

Q. Did you use the same lard?

A. Yes, sir.

Q. But you used a different package?

A. Different package, yes.

Q. Is that correct?

A. Different formula.

Q. Is that the only difference between—

A. Their dough formula is different, and their fruit filling was different.

Q. Would you say substantially different?

A. There again, it's a matter of definition, how far you're going to go with it.

Q. All right. Then let's go back to the question. Isn't it a fact that the price at which you sell Utah Pies, which are 24-ounce pies, to the wholesale trade were sold at a higher price than the price that you sold Bel Air pies to Safeway?

Mr. Alioto: I take it he's speaking only of the pumpkin and mince pies.

Mr. Lamb: That's correct.

The Witness: What was the question again, please?

(Question read.)

A. The Utah Pies were sold at a higher price.

By Mr. Lamb:

Q. To your wholesale customers. A higher price.

[fol. 469] A. The Utah Pie is not a private label.

Q. I understand that. But my question is whether or not the price of the Utah Pie to your wholesale customers, who must sell to retailers who compete with the Safeway Stores—

A. The price of the Utah Pie was higher. I believe the private label pies were not.

Q. Do you know how much lower the private label pie was than the Utah Pie?

A. No, I'm not familiar with the prices at this time.

Q. Is the Frost 'N' Flame a private label pie?

A. Well, in a sense it is. It's a controlled label which is controlled by the A.G. Stores.

Q. Is the Frost 'N' Flame pie a 24-ounce pie?

A. Yes, sir.

Q. Does it compare in quality to the Utah Pie?

A. Similar quality.

Q. Is it identical?

A. Yes, sir.

Q. Now, will you tell me whether or not the price at which you sell the Utah Pie to a wholesaler is higher or lower than the price of the Frost 'N' Flame to your customers?

A. It's higher.

Q. It's higher. How much higher?

A. I couldn't say for sure. I'm not familiar with the pricing.

Q. In your capacity as the one in charge of costing, have you ever attempted to justify the difference in costs between the Utah Pie and the Frost 'N' Flame pie?

A. No, sir, I haven't broken it down.

Cross examination.

By Mr. Schafer:

Q. Am I correct in understanding, Mr. Rigby, you're not the fellow who visited the Watsonville plant of the Morton Company?

A. That is correct.

Q. You're not the one?

A. No, sir.

Q. Do you know the purpose of a coding device?

A. Only what's been stated here in the courtroom. I don't know any more about it.

Q. Could you tell me in your own words what you conceive the purpose of a coding device to be?

A. Actually, I don't know the exact purpose, as was stated yesterday. The coding device would record your date that the pie was made and the time of day, whether it was made in the morning or the afternoon. I would imagine it would be used to, if there was, like you stated yesterday, some discrepancy in the product, the finished product, that came up at a later date, they could possibly trace it [fol. 470] back to when it was made or actually run.

Q. So that if you produced a run of pies and you put them in your warehouse before you sold them, you can look, and suddenly it turns up that you have happened to use sour cream, or anything has gone wrong with that run, you can go to that run and know which pies came off that run; isn't that right?

A. Not necessarily.

Q. And you pull those pies out of your warehouse?

The Court: Well, do you know anything about this business of coding device at all?

The Witness: Not any more than what's been said here in the courtroom.

By Mr. Schafer:

Q. You don't know why manufacturers like Bel Air, Safeway, wanted a coding device?

A. No, not for sure. As far as I'm concerned—

The Court: All you know is what you heard in the courtroom?

The Witness: At the time they signed this—

The Court: Just a minute. Did you just tell me that all you know about this is what you heard here in the courtroom yesterday?

The Witness: Yes, sir.

By Mr. Schafer:

Q. And you don't have a coding device, is that right, sir?

A. No, we do not.

Q. Do you have a quality control man in the plant?

A. No, we do not.

Q. Are you aware that Safeway complained about the absence of a quality control man in your plant?

A. They mentioned that they would like us to have one, yes, and required certain reports filled out by quality control man in the actual production of their pies.

Q. I failed, I think, to ask whether in respect to the mince business for the Bel Air label in 1961, whether or not it isn't true that you are not able to—you found you were not able to handle that business because you didn't have the right machine for the Safeway block on the box? Am I correct in that understanding?

A. To an extent, yes.

[fol. 471] Q. So that you lost—

A. I mean, we could have handled the business had we have got the Safeway business; but to buy this expensive insert, it wouldn't pay us to run it for two months out of the year.

Q. Yes.

A. If Safeway would have given us their business, we could have handled it.

Q. But the fact of the matter is you couldn't have handled the mince in 1961 because you didn't have the right machine? Right?

A. We had the right machine. We didn't have the right lock. It's a slight modification.

Q. Yes. And you couldn't handle the pumpkin or mince business in 1962 for the same reason?

A. That is true.

Q. What speeds, sir—let me start over. Do you know in terms of the per minute basis—there was testimony yesterday as to your production capacity, and I wonder if you know what your production is in terms of a per minute basis, of fruit pies.

A. 35 to 40 a minute.

Mr. Alioto: There was nothing on the direct examination about the production. That was another witness. If he wants to recall him, I have no objection.

The Court: Sustained.

Mr. Schafer: This man is a production man, your Honor.

The Court: Sustained.

Mr. Schafer: I think the witness did answer the question.

The Court: Sustained. It's stricken.

Mr. Schafer: Stricken. All right. I just wanted to make sure that your Honor understood he answered.

The Court: Stricken.

By Mr. Schafer:

Q. Now, you've testified, Mr. Rigby, as I understand it, that you don't keep any cost records?

A. Cost records as such, I am sure referred to you, which is kept by the defendant companies, no, we do not.

Q. And I believe—am I correct in understanding, sir, [fol. 472] that when your deposition was taken in this action that it was agreed between yourself and your counsel and the defendant's counsel that Mr. Zimmerman would go into your plant and determine what your costs of production were; is that correct?

A. That's correct.

Q. Have you seen the result of his studies, sir?

A. I saw them yesterday over in Mr. Caldwell's office. That's the first time I've seen them.

Q. As far as you know, sir, are they accurate?

A. As far as I know, yes. You mean the actual costs which he came up with?

Q. Yes.

A. For producing a certain make pie?

Q. Yes.

A. Yes.

Q. You have no reason to question those?

A. No.

* * * * * * *

Q. Do you know any figures that would cost justify, if you understand my use of the term, the differences between the Utah label pie and the Frost 'N' Flame pie?

A. No, I don't know of any exact figures, no.

Q. Any differences which would explain cost justification—excuse me—any differences in price as between the Utah pie and the Sunny Boy label pie?

A. As I have stated, there are things that could be brought in here, but I have never actually sat down and figured a penny-by-penny difference.

Q. My question is only if you know of any documents?

The Court: His answer is "no".

A. No.

By Mr. Schafer:

Q. Do you know of any documents which would explain or cost justify any differences in price as between the Frost 'N' Flame and the Sonny Boy labels?

A. No, no documents which would reflect this.

Q. Or any as between the Utah label and the Mayfresh label?

A. No, I can't say as—when you pin it down to any documents, no, I don't know of any.

Q. Or any as between the Bel Air pumpkin and mince and the Sonny Boy pumpkin and mince?

A. We don't have any documents, as far as breaking down a cost which would show you this, no.

[fol. 473] Q. Which would show me any, what the law calls cost justification, correct?

A. Pardon me?

Q. You don't know of any documents as between your various labels—

The Court: I think he has answered that, Mr. Schafer, over and over again.

Mr. Schafer: All right.

The Court: He doesn't know anything about that.

By Mr. Schafer:

Q. It is suggested, Mr. Rigby, that I haven't made it clear that the Utah Pie Company does manufacture those labels, and do you agree with me that it does manufacture the labels I have just enunciated?

A. Yes.

The Court: Well, if he understands what labels you are talking about, I don't.

Mr. Schafer: Shall I go down them all?

The Court: How many of them are there?

Mr. Schafer: About four.

The Court: Why don't you name them.

By Mr. Schafer:

Q. Do you agree with me, sir, that the Utah Pie Company manufactures—

The Court: Just name the labels.

By Mr. Schafer:

Q. Mayfresh?

A. Yes.

Q. Sonny Boy?

A. Yes.

Q. Frost 'N' Flame?
A. Yes.
Q. Bel Air pumpkin and mince.
A. At times we have made them, yes.
Q. Back in 1961?
A. Yes.
Q. Have I forgotten any? Of course, you have the Utah label.
A. The Utah
Q. Is that all of them?
A. That is all.

Redirect examination.

By Mr. Alioto:

Q. Mr. Rigby, when you were asked about whether or [fol. 474] not you kept cost records, I take it you meant cost records as such, as cost records?
A. That is correct.
Q. And the manner in which these cost records were kept, some of these cost records we have been in court, is that what you meant?
A. Yes, that's what I meant.
Q. Actually, you do keep records of all of your sales, don't you?

Mr. Schafer: He is leading his own witness, your Honor.

By Mr. Alioto:

Q. State whether or not you keep records of your own sales.
A. Yes, they are kept by the bookkeeper.
Q. State whether or not you keep records of all salaries paid.
A. Yes.
Q. State whether or not you keep records of all interest paid.
A. Yes.
Q. State whether or not you keep records of all depreciation.

A. Yes.

Q. State whether or not you keep records of all advertising.

A. Yes.

Q. State whether or not you keep records of all rentals paid to machinery companies.

A. Yes.

Q. State whether or not you keep records on repairs in the plant.

A. Yes.

Q. State whether or not you keep records on truck and delivery expenses.

A. Yes.

Q. State whether or not you keep records on storage expenses.

A. Yes.

Q. State whether or not you keep records on legal expenses.

A. Yes.

Q. And I take it when Mr. Zimmerman came to the plant at the behest of these defendants, that you showed him all of these records, or he had access to these books and records?

A. Yes. As far as I know, he had access to all the records of our company.

* * * * * * *

[fol. 475] Myron K. Rigby, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Alioto:

* * * * * * *

Q. Without telling us what the nature of that conversation was, state whether or not you thereafter personally contacted any representative of the Pet Company?

A. Yes.

* * * * * * *

Q. You called to the Pet Company?

A. Yes.

Q. And whom did you ask for?

A. The name I had been given by Mr. Smith.

Q. And did you identify yourself in this telephone conversation?

A. Yes.

Q. Who did you say you were?

A. Myron Rigby from Salt Lake City, connected with the Utah Pie Company.

Q. And then you had a conversation with this man from Pet. Do you know what position he held, if you don't remember his name?

[fol. 476] A. He was the Superintendent or the production manager.

Q. State to the Court and Jury the substance of that conversation.

A. I just expressed my desire to go through his plant, because Mr. Smith had told me they had one of the finest operations, as far as machinery and this sort of thing, and I would like to see it while I was in California.

And he just told me no, that it couldn't be arranged.

Mr. Alioto: We have no further questions.

Cross examination.

By Mr. Lamb:

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[fol. 478] Mr. Lamb: Your Honor, I move to strike the witness's testimony on the grounds that it doesn't prove or disprove any of the issues of this case, has no bearing upon a conspiracy or the alleged discrimination—

Mr. Alioto: We'll submit it.

The Court: The motion is denied. You wanted that time fixed, and counsel is trying to fix it for you.

By Mr. Alioto:

Q. Do you recall whether your wife came in the beginning—what's your recollection on that?—The beginning of

your service period or towards the end of the service period? Did she go home with you? Do you recall that?

A. Yes.

Q. All right. Therefore, she came in the end of the period?

A. I don't recall exactly when she came. She could tell me more about the dates.

Q. All right. And you will make a search during the noon hour to see if you can't get these Army orders, Mr. Lamb?

A. Yes.

Mr. Alioto: Thank you.

Mr. Lamb: Now, I move to strike his entire testimony, your Honor.

The Court: The motion is denied.

Mr. Schafer: I have a few questions on *redirect*, your Honor.

Cross examination.

By Mr. Schafer:

Q. You testified, Mr. Ross, that you purchased apples from Al Smith when he was operating the Del Mar Company?

A. I'm Myron.

Q. I'm sorry. I apologize.

A. Yes.

Q. And you purchased apples starting in 19—when did you start purchasing apples?

A. I don't have any date when.

Q. Did you purchase apples from him through 1961?

A. I'm not sure if we continued or not.

Q. You testified that you went through the Watsonville plant of Al Smith's? Right?

A. I did.

Q. And it was then being run for Morton; is that right?

A. Yes.

Q. Did you check with Morton before you went through it?

A. No, I didn't check with Morton. I understood that Al [fol. 479-480] Smith owned it.

Q. Did Al Smith—

A. He invited me to go through with him, and he took me through.

Q. Yes. Yes. And did Al Smith check with Morton, do you know?

A. I don't know whether Smith checked with Morton, no, I don't.

Q. Did anybody from Morton ever complain to you about this?

A. No.

Q. Did anybody—excuse me.

A. The lady in charge of quality control, I was introduced to her, and Mr. Smith told me she was hired by Morton.

Q. Yes.

A. And, if I recall, she was the one that handed us our white hats to put on before we entered the plant. And if she was hired by Morton, then it was sanctioned to a certain extent by a Morton employee.

Q. But nobody from Morton ever objected about this to you?

A. No.

Q. Nobody ever accused you of spying?

A. They couldn't accuse me of spying, when they knew who I was.

Q. Morton didn't know who you were, did they?

A. Yes.

Q. Did Morton know who you were?

A. Mr. Smith introduced me and told them who we were and the type of business which we were in.

Q. Yes. But no officer or anybody of Morton's were there, were they?

A. I don't know if there was or not.

Q. Could you describe to the jury, Myron, what the plant looked like? Not very fancy, was it?

A. No. It wasn't very fancy at all.

Q. Could you tell them how it was laid out, what it looked like?

A. Do you want my honest opinion?

The Court: No, no, no.

By Mr. Schafer:

Q. No, I just want you to describe the physical layout of it.

The Court: You shouldn't take this honest opinion. I'm not going to permit you to pursue that any further. It is clear outside the direct examination. It certainly hasn't any purpose in this lawsuit.

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[fol. 481] Gaylen S. Rigby, called on behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Rigby, would you be good enough to state your full name, please?

A. Gaylen S. Rigby.

Q. And where do you live?

A. Salt Lake City.

Q. How old are you?

A. Thirty-one.

Q. What's your relationship to these three boys—three young men who were here?

A. They're my cousins.

Q. What do you do in the plant?

A. At the present time I'm sales manager, and I also work on the inside of the plant.

Q. And how long have you been sales manager of the company?

A. Two or three years.

Q. How long have you been working down there?

A. Since I was in grade school.

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Q. Does that mean you were working after schools?
A. After schools.
Q. How about week ends?
A. Week ends, holidays, summer.

• • • • • • •

Mr. Lamb: Your Honor, I object to this line of questioning. Why should there be a mystery about this two and a half years?

Mr. Alioto: Because you objected yesterday—

The Court: Because he might elicit something that we don't brought into this lawsuit, and I think what we're talking about.

Mr. Lamb: Yes. But how is this relevant that he was away?

[fol. 482] Mr. Alioto: I want to show his experience in this industry over all the years and the number of years which he's been in it, because this witness is going to be asked many questions by you, as well as by ourselves.

Mr. Lamb: Yes, but the innuendo here is—

The Court: Well, there isn't any innuendo.

Mr. Alioto: There isn't any innuendo.

Mr. Lamb: I'll object to the line of questioning.

The Court: Overruled.

By Mr. Alioto:

Q. Just state the period of time that you were not working in this plant.
A. January of '51 to the summer of '53.
Q. Okay. When did you start working in this plant full time?
A. 1949.
Q. What is the nature of the education, if any, which you have had beyond high school?
A. I had a year and a half of college.
Q. And where?
A. University of Utah.
Q. And what did you study?
A. Business.
Q. How long has the plaintiff corporation, or the plain-

tiff company, or its predecessors been in the pie business in this area approximately?

A. Thirty years.

Q. How long have you been in the frozen pie business?

A. Since the fall of 1957.

Q. Where was the business located prior to the time you went into the frozen pie business?

A. Our location was 2575 South State Street, Salt Lake City.

Q. And what were you manufacturing at that location?

A. Fresh baked 8-inch fruit pies, 9-inch fruit pies, cream pies of eight and 9-inch size, and a small individual pie, size of 4⅜.

Q. Before you went into the frozen pie business what was the geographical distribution that you had for your freshly baked pies?

A. We shipped into all of Utah, Las Vegas, Nevada, Grand Junction, Colorado, Farmington, New Mexico, Evanston, Wyoming, I believe Ely or Elko, Nevada, or both.

Q. Now, there came a time, Mr. Rigby, when the company went into the frozen pie business, I take it?

A. Yes.

[fol. 483] Q. And when was that?

A. Approximately August of 1957.

Q. August of '57?

A. Yes, sir.

Q. Where were you located at the time?

A. In our plant on State Street.

Q. What was necessary so far as additional equipment or location or anything else to make that transformation from the baked pie business into the frozen pie business?

A. There was nothing. We needed nothing to move from fresh pie to frozen pies.

Q. You used the same location, did you?

A. Yes.

Q. You already had freezing facilities?

A. Yes.

Q. Okay. Now, in August of 1957 when you first went into the frozen pie business, what flavors did you make?

A. Apple, cherry, boysenberry, pumpkin, and mince, and maybe—no, blueberry was later. And peach was later.

Q. Now, in 1958, beginning in 1958, what was the approximate geographical spread of your distribution of frozen pies, as distinguished from freshly baked pies?

A. Utah and Idaho, in the first part of '58.

Q. Yes. What portions of Idaho?

A. All over Idaho. In the Boise area, especially.

Q. Tell us something about your pricing system at that period of time. Was it a delivered price zone system, or was it an f.o.b. plant system?

A. It wasn't a delivered price zone system. We don't use that type of operation. Our price was based on an f.o.b. delivered to the purchasers' warehouse here in Salt Lake City. If it was outside of Salt Lake City, it was f.o.b. our plant.

Q. And now, let's see what that means in layman's language. Just give me any customer you have in Salt Lake City in the early part of '58. Anyone.

A. Safeway.

Q. All right. Now, what kind of pies were you selling to Safeway in early 1958?

A. All of our flavors. Apple, cherry—

Q. Under what label?

A. The Utah Pie label.

Q. Okay. Now, where did Safeway take delivery of its pies?

A. Utah Ice and Cold Storage.

Q. That's located in Salt Lake City?

A. Yes, sir.

Q. And the price that you charged Safeway at that time was the price in that plant; is that correct?

A. That's true.

Q. Now then, let's take a customer out of State. We'll say in Utah, out of the city in Utah. How was your pricing figure so far as he was concerned?

[fol. 484] A. Well, in Utah—we'd have to go back to Safeway. They delivered to their own stores.

Q. No. But aside from Safeway, give me a customer that was not located in Salt Lake City, if you recall one.

A. Well, they all delivered out of Salt Lake City. Everything was delivered out of here to the stores.

Q. Yes.

A. Our first customers were Associated Foods, Utah Wholesale, and Safeway.

Q. And they are located in Salt Lake City?

A. Yes.

Q. Now, what other expense was incurred by their delivery to any far away point, was that assumed by you or assumed by the buyer?

A. Assumed by the buyer.

Q. Was that the system as far as pricing was concerned that you have continued—that you used in the years '59, '60, and '61?

A. Basically. Now, we have customers that—in Idaho. They send their trucks down here, they come to our plant, and we load them at our plant, and they haul them back to their destination on their own trucks.

Q. Now, at my request, Mr. Rigby, have you prepared a statement showing the geographical spread of your distribution by year?

A. Yes, I have.

Mr. Alioto: Will you mark this?

(Plaintiff's Exhibit No. 82 was thereupon marked for identification.)

By Mr. Alioto:

Q. I show you a document marked 82 for identification, which has previously been handed counsel for defendants, and ask you to examine it please, and then state whether or not that was prepared under your supervision.

A. Yes. I prepared this document.

Q. To the best of your knowledge does it accurately set forth the facts?

A. Yes.

Mr. Alioto: We'll offer it in evidence, if your Honor please.

Mr. Lamb: No objection.

Mr. Billings: I haven't even seen it.

Mr. Schafer: Which one?

[fol. 485] The Court: It's received.

Mr. Schafer: Your Honor, if I may make a short statement. As I understood, it was agreed that Exhibit 4 was accurate. And my problem here is that this schedule does not comport with Exhibit 4.

Mr. Alioto: Well, Exhibit 4 is a document prepared by you folks?

Mr. Schafer: Yes. Well, Mr. Zimmerman.

Mr. Alioto: Mr. Zimmerman?

Mr. Schafer: That's not invoice, your Honor, that he prepared. Now, I understood Plaintiff has said that's accurate. That's what you said in your answers to interrogatories.

Mr. Alioto: Well, we think it's substantially accurate, but this is a more substantially detailed refinement of these things. I don't think there's any substantial difference. We're offering this for what it's worth, if your Honor please.

The Court: Received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 82 for identification was received in evidence.)

Mr. Alioto: 82 in evidence is the Utah Pie Company, the total sales by year and state. Fiscal 1958.

By Mr. Alioto:

Q. What do you mean, "Fiscal 1958"? What is the fiscal period?

A. October 31 is the end of our fiscal year.

Q. So this would be the end of 1958, would it? October 1 of 1958? Or would this be October 1 of 1959, the first one?

A. That's the end of—October 31, 1958.

Q. Yes. These are frozen pies only?

A. Yes, sir.

Q. All flavors?

A. Yes, sir.

Mr. Alioto: Fiscal 1958, Utah 62,000 cases, Idaho 4,000 cases, Nevada 1,000 cases, Wyoming 1,000 cases. Fiscal

1959, Utah 84,000 cases, Idaho 12,000 cases, Wyoming 604 cases, Colorado 9600 cases, California 50 cases, Montana [fol. 486] 800 cases. Fiscal 1960, Utah 128,000 cases, Idaho 8700 cases, Colorado 7900 cases, Washington 30,000 cases, Nevada 799 cases, Montana 678 cases. Fiscal 1961, Utah 199,000 cases, Idaho 13,000 cases, Washington 32,000 cases, Oregon 2500 cases, Colorado 104 cases, Wyoming 98 cases.

By Mr. Alioto:

Q. Mr. Rigby, I want to direct your attention now to what sales effort was made by you from the time you started into the frozen pie business down to the date of the filing of the complaint. First of all, with respect to Exhibit 82, the predominant sales, of course, are in the State of Utah. Does that mean, does the exhibit mean, or is it the fact, that all of the pies which you delivered in Utah were distributed in Utah at retail?

A. No.

Q. All right. Now, tell us why that is not so.

A. Well, Safeway—this is the Salt Lake City Division for Safeway.

Q. Yes.

A. They have some sixty odd stores in their division. That encompasses all the stores in Utah, almost all the stores in Idaho, a few stores in Oregon, and a few stores in Wyoming, a few stores in eastern Nevada, which encompasses the Safeway Division—Salt Lake Division. We deliver to their warehouse here in Salt Lake. They in turn deliver to these other points. With Associated Foods, there was a time when we delivered to their warehouse here in Salt Lake City, and they would deliver them to stores in southern Idaho, and also in Utah.

Q. Which other customer receives in Salt Lake City and distributes outside the state, as well as inside the state?

A. Northern Sales. They are located in Logan. They pick up at our warehouse in Salt Lake City. They take them to Logan, and they in turn distribute to stores in southern Idaho. Also in—

Q. Excuse me. Excuse me. Are you talking about Northern sales?

A. That's the name of a distributor.

Q. What's the nature of that organization?

A. He buys—he's a frozen food distributor. He buys frozen foods and distributes them to stores.

Q. Now, this is not a buying cooperative is it?

A. No.

Q. This is a commercial distributor?

A. Yes.

Q. Now, what other customer do you have in Salt Lake City that buys here but distributes in states other than the State of Utah?

A. There are a number of—

Q. How about Utah Grocery? Did you mention that?

A. Utah Wholesale Grocery. We deliver to their warehouse in Salt Lake City, and there are stores in eastern [fol. 487] Nevada that bring their trucks to Salt Lake City and pick up frozen foods there and take them back to Nevada, and they are sold there.

Q. What is the nature of the Utah—that's what it called? Utah Wholesale Grocery?

A. Yes.

Q. What is the nature of that organization?

A. That is an organization that buys merchandise and resells it to chain stores and other stores just buy from them.

Q. Have you mentioned, Mr. Rigby, all of the large buyers in Salt Lake City?

A. In Salt Lake City proper, yes. There are some in Ogden.

Q. Would you be good enough to mention those in Ogden?

A. Now it is called the Mayfair Stores; Grand Central and Grand American.

Q. What was it called from 1958 to 1961?

A. Well, 1958 it was a distributor by the name of Camelia Distributing sold to American Food Stores. I think in 1960, Mayfair Stores of Los Angeles purchased the American Food Stores in Ogden, which comprises about ten supermarkets.

Q. Now, what was the nature of the organization called American Grocers in Ogden before being purchased by Mayfair?

A. Well, Camelia distributed to the American Food Stores. And then when they were purchased, they eliminated Camelia. American Food Stores bought Camelia's truck and their distributing, and they did their own distributing.

Q. Is this some kind of a buying cooperative? American Food Stores?

A. No.

Q. That's a commercial organization, too?

A. Yes.

Q. Do you know approximately, getting back to Associated Grocers, about which we've heard considerable testimony, what is the nature of Associated Grocers?

A. That is a buying co-op.

Q. Do you know how many stores Associated Grocers has in the Intermountain Area?

A. Oh, there would be around 400, I would think, in Utah and Idaho, and in the Helena, Montana, area.

Q. In other words, those stores are located in Montana, Idaho and Utah?

A. Yes.

Q. The buying, however, is done here?

A. Not for all of it, no. There is four divisions now. They do their own buying separately.

Q. With respect to the stores in Ogden, or with respect to your customers in Ogden, on what kind of a price basis do they buy? Is it the same price in Ogden as it is in Salt Lake City?

A. No. It is f.o.b. our plant.

[fol. 488] Q. In other words, they come and pick it up at your plant?

A. Yes.

Q. And the cost of freight from your plant to Ogden is borne by the buyer?

A. True.

Q. With respect to your Exhibit 82, which is the total

sales by year and by state, I want to direct your attention to certain sales effort on specific states.

I notice from this exhibit that you sold in Colorado for the first time in fiscal 1959. In that year you sold 9600 cases. Would you be good enough to state the facts with respect to the sales effort you made to get into Colorado in '59. You weren't there, you recall, in '58, according to the exhibit.

A. True.

Q. State the facts as to what you did.

A. I made two or three trips into Colorado trying to sell pies. We hired a broker in Denver. He couldn't sell anything for us, so we let him go. I went back in, I believe, September—August or September of '59—contacted the major chain stores, attempting to sell them direct to the chain stores. They have their own warehouses. I talked to King Supers, Safeways, Miller Supers, H. A. Marr, Furr Foods. I was able to convince H. A. Marr to buy some frozen pies from us, convince them that our pie was of good quality, and the price was comparable—was right. So he agreed to buy pumpkin—some pumpkin and mince pies from us in the fall of 1959.

Q. That was in the fall of 1959 that you first started to ship?

A. Yes.

Q. Did you get repeat orders in 1960?

A. In our fiscal year 1960.

Q. Yes.

A. After October 31, yes. We sold pies that one fall in Denver, and that was all.

Q. Do I understand, then, that the two figures shown on Exhibit 82 for Colorado—in fiscal 1959 is 9600 cases and fiscal 1960 is 7900 cases—do I understand that those sales were made, all of them were made, at or about the same time?

A. Within a six- or eight-week period.

Q. In other words, just overlapped your fiscal year?

A. That is true.

Q. Did you sell in Colorado after that time?

A. No.

Q. What was the basis on which you priced in Colorado? Was it a zone delivered price system or was it an f.o.b. system?

A. It was a delivered price. By that I mean our comparable price here in Salt Lake City plus freight into Denver.

[fol. 489] Q. You added the freight into Denver?

A. Yes.

Q. Approximately what was the freight into Denver during this one period of time when you sold in Colorado?

A. Twenty cents a dozen.

Mr. Alioto: We offer at this time, if your Honor please, as Plaintiff's Exhibit 83, certain invoices of the Morton Company in the Denver, Colorado area and certain invoices of the same company at or about the same time in the area of Virginia, where its plant was located.

* * * * * * *

Mr. Schafer: Well, your Honor, I can state easily the objection to the Virginia invoices. They have nothing to do with the case. The plant located in Virginia was not shipping into Denver.

Mr. Alioto: Yes. You had better look at that Denver invoice more closely before you make that statement. Look at it again.

Mr. Schafer: All right. Well, the objection is basic anyway. There is no dispute in the record, your Honor, but that there are price differences in the country from time to time. Nobody ever denied that Morton can't sell at the same price throughout the country in all of the marketing areas. So this is purely cumulative to what Morton has consistently stipulated to be the fact. So as to those exhibits, I don't think there is any pertinency or necessity for putting them into this record.

Mr. Alioto: If your Honor please, it shows the extent of the price discriminations between Virginia and Denver, Virginia where the plant is located and Denver being away as far as it is. We will submit the objection.

Mr. Schafer: Now, as to the Denver invoices, Your Honor, by themselves, the interrogatories have listed what [fol. 490] customers the plaintiff claims to have lost by

reason of these alleged price differences. Denver customers are not listed in those interrogatories. The case has proceeded, discovery has proceeded, defendants' preparation has proceeded, on the assumption that what was stated in the responses the plaintiff made to our interrogatories was true and accurate, and there was no statement made that Denver customers were in any way lost, or any business was affected. So on that basis I object to the entire Denver interrogation and the exhibits.

Mr. Alioto: The loss of the Colorado market is one of the big points in this case, if your Honor please, and we have discussed it from time to time in the pretrial proceedings.

The Court: Overruled.

Mr. Schafer: Your Honor, may I read—

A. Yes.

Mr. Alioto: May I read this to the jury?

The Court: Go ahead, Mr. Schafer. Let's hear what you have.

Mr. Schafer: The question in the interrogatories:

"Name and address of each customer who plaintiff has lost or whose purchases have been diminished by virtue of any alleged agreement, combinations, or conspiracies and price discrimination."

Answer: "Safeway, Salt Lake City; American Food Stores, Ogden; Associated Food Stores, Pocatello."

Now, that is what we proceeded on, your Honor. That is what was told us early in this trial.

Mr. Alioto: In answer, there have been lots—

Mr. Schafer: I haven't finished.

Mr. Alioto: (Continuing) —of depositions in the meantime, and lots of pretrial conferences in the meantime, and the loss of the Colorado market has always been an important factor to us.

Mr. Schafer: We asked them explicitly. Your Honor has heard the question and the answer.

[fol. 491] The Court: Overruled.

Mr. Billings: Your Honor, may the record show this is not being introduced as to Carnation.

Mr. Alioto: At this time it is being offered only as to the Morton Company.

Mr. Lamb: I would like to have the same objection, and I am also taken by surprise, your Honor, on this interrogatory. This constantly changes.

Mr. Alioto: I object to that remark about constantly changing. Mr. Lamb knows better than anybody in this courtroom that we have discussed the Colorado market in the discovery proceedings of this case.

The Court: Well, overruled.

Mr. Alioto: These invoices, ladies and gentlemen, show, first of all—this is January 26, or 1960, an invoice to the Valley Frozen Foods, Waynesboro, Virginia. The invoice shows that it came from the Crozet, Virginia plant of Morton Foods, and apple pie is set out at $3.80 in Virginia to that customer.

The next invoice, dated January 22, 1960, within four days, is to Associated Grocers of Colorado, Denver, Colorado, and the invoice shows that it came from the Crozet, Virginia plant, the same plant, and apple here is $3.35, with the freight prepaid by the seller. That is $3.35 in Denver and $3.80 in Virginia.

The cherry pie in Virginia is $3.80 and the cherry pie in Denver is $3.35. It came from the West Crozet, Virginia plant.

The other invoices show in March of 1960 in Denver, Colorado, from the Webster City, Iowa plant, apple sold at $3.44 in Denver, cherry at $3.44 in Denver.

There is an invoice to Safeway in Denver dated March of 1960. This came from the City Ice Company warehouse. Apple, $3.35; cherry, $3.35.

By Mr. Alioto:

Q. What efforts did you make after you got this one shipment, or this series of shipments, in the fall of 1960, [fol. 492] was it?

A. The fall of 1959.

Q. All right, in the fall of 1959, when you got these series of shipments to Colorado, what efforts did you make after that to stay in the Colorado market?

A. I made repeated trips to Colorado contacting the chain stores, the buying groups, talking to the buyers, and they all indicated to me that—

Mr. Schafer: Now, your Honor, whatever he is going to say now is clearly hearsay.

The Court: Yes.

By Mr. Alioto:

Q. All right. You made repeated trips to Denver, you stated, and you talked to the buyers in Denver?

A. Right.

Q. Is that correct? Now, without telling us what was said by the buyers and what was said by you, tell us whether or not you received orders in Colorado after that fall?

A. No, I did not.

Q. Now, the record shows that you have—82 shows 104 cases, as distinguished from 7996, or approximately 17,000 in those two years, and in fiscal 1961 only 104 cases. Do you recall the customer on that 104 cases?

A. Yes. They are Rust Sales. They have an office here in Salt Lake City. Their main office is in Denver. And he told us that he thought he could get us some business in Denver, and he wanted some pies in Denver to show them around to the different buyers. So we sent 104 cases to Denver on his truck, and he couldn't sell anything either.

Q. What specific customers did you have in the Denver area in that fall of 1960 that you were not able to sell after you had made these visits there?

A. H. A. Marr. It is now a division of Red Owl.

Q. What is the nature of that organization?

A. It is a chain store.

Q. Who else?

A. We sold some pies to the Arapahoe Stores in Pueblo, Colorado. They have five or six big supermarkets in Pueblo. They were buying—they were part of the Associated Foods organization. They bought from Associated Foods. And I went back to Pueblo to talk to them, and they said, no, they weren't interested in buying any more pies because Morton had offered—

[fol. 493] Mr. Schafer: No, no, no, your Honor. This is clearly hearsay.

Mr. Alioto: If your Honor please, they illicited on their side of the case what the buyers told them.

Mr. Schafer: No.

Mr. Alioto: Let me try to reach it in this way, try to reach it in this way.

By Mr. Alioto:

Q. What reasons were generally assigned by the buyers for not re-ordering from you?

Mr. Schafer: Same objection, your Honor, clearly hearsay.

The Court: Yes, it is hearsay. Sustained.

Mr. Alioto: We will offer at this time, if your Honor please, the Morton invoices in the Denver market from 1958 to 1961, segregated as to years, they being Plaintiff's Exhibit 77, Plaintiff's Exhibit 78, Plaintiff's Exhibit 79, and Plaintiff's Exhibit 80.

Mr. Schafer: On these, your Honor, I simply would say, as I said before, that I don't concede Denver is properly in this case because of the answers to the interrogatories that we were furnished back in the spring of 1962. Moreover, we have agreed—

Mr. Alioto: Did you read these interrogatories in January of 1963?

Mr. Schafer: January 11 of 1963.

Mr. Alioto: Would you read them out loud to see what they say.

Mr. Schafer: They came along too late, your Honor, for any discovery on those interrogatories.

Mr. Alioto: Why didn't you mention that before?

Mr. Schafer: Two weeks before the trial. That was mentioned here in court on the motion for summary judgment. Your Honor, Mr. Kesler took that up for me on the motion.

[fol. 494] The Court: If you want to have an argument, take it up with me, both of you.

Mr. Schafer: As to the Denver invoices, your Honor, I would simply say that we have agreed as to what the prices were in Denver, and I see no reason to burden the record with all these invoices. That is all my concern is on that.

The Court: The objection is overruled.

Mr. Billings: Will you make the same statement, Mr. Alioto, with respect—

The Court: Overruled.

Mr. Alioto: That these are being offered at the present time only as to the Morton Company.

Ladies and gentlemen, I just want to read you some invoices in 1958 in the Denver area. Cherry pie to H. A. Marr Company, 1958, $5.16 in the Denver area. Apple pie—This is an invoice to the Inland Frosted Foods in Denver of 1958. Apple pie, $5.16, 1958.

Now, I take the Denver invoices of the same company in 1961. Here is apple pie in September of 1961, $3.65; $5.16 in 1958, $3.65. Cherry pie, $3.65.

In June of 1961, apple pie, $3.00; cherry pie, $3.65. This is a sale to the Red Owl Stores, Inc., in June 9 of 1961.

The Safeway invoice, April 12 of 1961, apple pie, $3.00; it is $3.65 with a 65 cent allowance, $3.00, 1961.

By Mr. Alioto:

Q. Now, Mr. Rigby, would you be good enough to state the facts with respect to what kind of a sales effort you made in the Washington market?

A. I spent two weeks traveling in Washington and Oregon. I was with a broker who knew the customers, who was acquainted with them and had sold them previously on other products.

We traveled from Spokane to Seattle to Portland, and all intermediate towns in between. We talked to every frozen food buyer and every chain in Washington and Oregon, and I wasn't able to sell any pies.

[fol. 495] But on speculation we sent a truck load of pies into Portland, Oregon, where this broker—or, he had a room there, he paid the storage on them, and we tried to sell pies. We repeatedly could not sell pies because of—

Mr. Schafer: No, no. We are getting into hearsay again.

* * * * * * *

Mr. Alioto: All right, I will agree with counsel, and I will put the explicit proof in the record and argue it to the jury later.

We offer at this time Plaintiff's Exhibit 84, being the Washington invoices of the Continental Baking Company; Plaintiff's Exhibit 85, the Washington invoices of the Continental Baking Company for 1959—84 was for 58—86, being the Washington invoices of the Continental Baking Company, Morton, for 1960; and 87 being the Washington invoices of the Continental Baking Company for 1961.

Mr. Schafer: Same redundancy objection, that is all.

Mr. Alioto: Offered as against Continental Baking only.

The Court: Overruled.

(The documents marked Plaintiff's Exhibits Nos. 84, 85, 86, and 87 for identification were received in evidence.)

[fol. 496] The Court: You may proceed.

Mr. Alioto: Washington invoices for 1958. The first one on top, in November of 1958, has apple pie at $4.78, cherry pie at $5.02.

Take them at random in the middle of the pile; Apple pie in November of 1958 to the Pacific Frozen Foods Company in Seattle, Washington, apple pie, $4.78. No cherry on that one.

In January of 1958, boysenberry pie, and to Perry Brothers, Seattle, Washington, $5.54 per dozen; apple pie in March of 1958, $4.72 per dozen, in '58.

In 1961, January 26 of '61, J. W. Morgner, in Seattle, Washington, apple $3.50—$4.16 price, with deduction of 66 cents, a net of $3.50.

In June of 1961, cherry pie, $4.16, a deduction of 66 cents there, or a net of $3.50; apple pie to Associated Grocers in Seattle, June 30, of 1961, a $4.00 price, with a deduction of 66 cents, or a net of $3.34; cherry pie the same thing, $3.34.

By Alioto:

Q. Did you ever succeed in your attempts to sell any volume in Seattle?

A. No.

Q. Now, this exhibit of yours, 82, does show some sales in Washington. It shows 32,000 cases in Washington—30,000 commencing in '60 and 32 commencing in—at the end of your fiscal '61 year. What area in Washington were they sold?

A. Spokane.

(Jury in the box.)

By Mr. Alioto:

Q. Mr. Rigby, you will recall that this morning—I thought I concluded the Denver, the matters relating to Denver, Colorado, the marketing in Denver, Colorado. But before doing that, I want to ask you a few questions on that subject. Did the Morton Company—that is, the *Consolidated* Baking Company—have a plant in Colorado during this period?

A. A frozen pie plant?

Q. Yes.

A. No.

Q. All right. Where were its plants located during this period of time?

Mr. Schafer: This is all in the record. I'll stipulate where the plants were located.

[fol. 497] By Mr. Alioto:

Q. All right. There was one in Webster City, one in Virginia, and one in California? Is that correct?

A. That's right.

Q. Do you know whether or not the position of your plant in the Intermountain Area gave you a freight advantage over Morton so far as its California plant was concerned?

Mr. Schafer: To where?

Mr. Alioto: If you'll let me finish, Mr. Schafer. Sit down. Don't be so nervous. Where was I when I was interrupted?

(Question read.)

By Mr. Alioto:

Q. Over Morton's California plant so far as the Colorado market is concerned?

Mr. Schafer: That's my objection, your Honor. The record shows that the Colorado market is served by Morton's Webster City plant, not California.

Mr. Alioto: We'll cover all of the plants.

Mr. Schafer: This is an irrelevant question.

The Court: Overruled.

Mr. Alioto: We'll submit it.

The Witness: Yes.

By Mr. Alioto:

Q. All right. Do you know whether or not it gave you a freight advantage so far as the Webster City plant was concerned?

A. Yes.

Q. Do you know whether or not it gave you a freight advantage so far as the Virginia plant of Morton was concerned?

A. Yes.

Q. All right. Now, at this period of time, the Carnation Company's plant was located in California, too, wasn't it?

A. Yes.

Q. And the plants of the Pet Milk Company were located in California, in Michigan, and in Pennsylvania?

A. Yes.

Q. And did you have a freight advantage over all three of those plants?

A. Yes.

Mr. Lamb: Your Honor, I object to this. To what point? [fol. 498] Mr. Alioto: Colorado. I'm speaking of Colorado.

Mr. Lamb: Does he know what the distance is from Frankfort to Denver? Do you know that? May I voir dire this witness, your Honor?

Mr. Alioto: Your Honor, it seems to me it is cross examination, if your Honor please.

The Court: Yes, I think that's right. I think this is cross examination.

Mr. Lamb: All right, your Honor.

Mr. Alioto: We'll offer at this time, if your Honor please—

The Court: He's lived around here all his life. That's in the record. All right. Go ahead.

Mr. Alioto: On this Denver, Colorado, matter, we'll offer finally Plaintiff's Exhibit 89, which are a series of invoices not included in the prior invoices offered by us. They're Morton invoices.

Mr. Schafer: May I see them, your Honor?

Mr. Alioto: Surely.

Mr. Schafer: Are these just the Morton sales in Denver?

Mr. Alioto: Yes. They're Denver invoices.

Mr. Schafer: They're all Denver invoices on Morton fruit pie sales; is that right?

Mr. Alioto: Yes.

Mr. Schafer: I just have the same objection to redundancy, your Honor.

The Court: All right. The same ruling. Overruled. They're received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 89 for identification was received in evidence.)

[fol. 499] Mr. Alioto: I just wanted to read these prices in the Denver area from the Morton Company beginning in 1958 and going down to 1961 on apple and cherry pie. The first invoice, October of 1958, apple pie, $5.16. May of 1959, apple pie, $3.93. December of 1959, apple pie, $3.65. January of 1960, apple pie, $3.80. January of 1960, apple pie, $3.80. February of 1960, apple pie, $3.35. March of 1960, apple pie, $3.38. October of 1960, apple pie, $3.20. October of 1960, apple pie, $3.20. October of 1960, apple pie, $3.35. October of 1960, apple pie, $3.20. June of 1961, apple pie, $3.15. June of 1961, apple pie, $3.00, to Safeway Stores. September of 1961, apple pie, $3.00, Colorado Wholesale Company.

We'll offer at this time, if your Honor please, the Oregon invoices of the Continental Baking Company—that is, Morton—for the period 1958 to 1961, marked Plaintiff's Exhibit 88.

The Court: Received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 88 for identification was received in evidence.)

By Mr. Alioto:

Q. What year did you first attempt to go into Portland? Approximate it for us.

A. 1960, January of 1960.

Q. 1960.

Mr. Alioto: These invoices, ladies and gentlemen, just reading at random, September of 1959, apple pies to the Minute Maid distributors, $4.28; October of 1961, $4.06 for apple pie; in 1958 the price of apple pie by Morton in Medford, Oregon, $5.16; in 1958 in Oregon, cherry pie, $5.24.

By Mr. Alioto:

Q. In 1958 you were not trying to compete in Oregon, were you?

A. No.

Mr. Schafer: Does that mean, Mr. Alioto, you withdraw the 1958 invoices?

Mr. Alioto: On the contrary, I want to show what your price was when he wasn't competing and what happened when he went into the market.

Mr. Schafer: I didn't understand the purpose of the last question.

[fol. 500] Mr. Alioto: That was the purpose.

By Mr. Alioto:

Q. Now, then, I want you to describe factually for the jury, for the Court and the jury, what effort you made to get the Safeway business. When did you first try to contact Safeway?

A. In Salt Lake City?

Q. Yes.

A. You mean the Bel Air business, or any Safeway business?

Q. Well, first of all, any kind of business with Safeway.

A. Well, in 1957, when we first went into the frozen pies, we contacted Safeway.

Q. What was the nature of the contact you made?

A. We called on their interviewer, presented our prices to him, and he took it into a meeting with all of the executive group of the Safeway Stores here.

Q. When you say you presented it to their interviewer, are you talking about a man in Salt Lake City?

A. Yes.

Q. You talked to him about selling what kind of pies?

A. Utah pies.

Q. Were you able to make sales to him of the Utah pies?

A. Yes.

Q. What kind of flavors did you sell to him under the Utah label?

A. Apple, cherry, boysenberry, pumpkin, and mince.

Q. And on what kind of a price basis, on a zone pricing basis or an f.o.b. warehouse, Salt Lake City?

A. F.o.b. warehouse, Salt Lake City.

Q. You delivered to Safeway during that period of time?

A. Yes.

Q. Now, then, did you ever attempt to get the Bel Air, the private label, brand of the Safeway Stores?

A. Yes.

Q. Would you be good enough to tell us when you started to try to get that?

A. The very first time was back in 1957.

Q. Without telling us the conversation, would you be good enough to tell us the gentleman in the Safeway organization you interviewed for that purpose?

A. Mr. Alan Young.

Q. And who is he?

A. He is the buyer for Safeway Stores, Incorporated, under the Bel Air label.

Q. Where is he located?

A. Oakland, California.

Q. Did you get an order for pumpkin and mince pies?

A. No.

Q. Under the Bel Air label?

A. Not in 1957.

[fol. 501] Q. When was the first time that you received an order for pumpkin and mince pies under the Bel Air label? Approximate it for us.

A. I believe in 1959, the fall of '59.

Q. During the time you were packing the pumpkin and mince pies for Safeway, did they have any gentlemen in the plant, any of their representatives in your plant?

A. Yes.

Q. What was the nature of the personnel?

A. They were quality control men.

Q. Quality control men?

A. Yes.

Q. Were they present in your plant during all the time you were packing pumpkin and mince pies for Safeway?

A. Not all the time, just to begin with.

Q. As a result of their presence in the plant, did you change anything in your actual process for making pies, as distinguished from your bookkeeping procedures?

A. None.

Q. Then, these quality control men, I take it, did from time to time request certain bookkeeping procedures to be followed?

A. True.

Q. Or record procedures?

A. Yes.

Q. Were those record procedures followed by you when they requested them in connection with pumpkin and mince?

A. Yes.

Q. Have you ever had any of the fruit pie business of the Safeway Company under the Bel Air label?

A. No.

Q. Could you make an approximation for us of the general volume of fruit pie business as against pumpkin and mince?

A. Pumpkin and mince is approximately just two months of the year. It is very good business in those two months, but it is still a very small part of the total volume on a year-round basis. The total cases would be very, very hard to determine without looking at some figures. I don't have them with me.

Q. You say it is a small part compared to the fruit flavors?

A. Oh, yes.

Q. Do you recall making a contact with the Safeway Company in June of 1960?

A. Yes, sir.

Q. Where was that contact made, here in Salt Lake City, or in California?

A. In San Francisco, California.

Q. With whom did you make that contact?

A. Mr. Alan Young.

Q. Do you recall the date on which you made that contact?

A. The exact date, no. It was about the middle of June, 10th, the 15th, something like that.

Q. Prior to that time had you discussed with Mr. Young the subject matter of your visit?

A. Yes.

[fol. 502] Q. And what was the subject matter of your visit, without giving us any conversations?

A. He had written—we had talked a number of times over the phone and written to each other several times about making Bel Air fruit pies. And it was my understanding that he was ready to have us manufacture Bel Air fruit pies in the Salt Lake and Denver Division of Safeway.

So he requested that I fly to San Francisco and talk to him and finish the last-minute preparations before going into production and to get the actual formulas of Bel Air pie.

Mr. Alioto: May I have this marked for identification.

(Plaintiff's Exhibit No. 90 was thereupon marked for identification.)

By Mr. Alioto:

Q. I show you a letter from the Safeway Company, from Mr. Alan W. Young to yourself, dated June 8, 1960. Would you be good enough to examine it, please, Mr. Rigby, and then state whether or not this refreshes your recollec-

tion with respect to the exact date on which you visited with Mr. Young.

A. I flew into San Francisco Monday morning, I believe it was June 21.

Q. How long did you stay with Mr. Young?

A. Three or four hours.

Q. And then what did you do, fly right back?

A. I made one contact and flew back the same day.

Q. You were there just for one day?

A. (Nodding.)

Q. You can't nod. You have to say "yes" for the record here.

A. Yes.

Q. Do you remember a day or two after you returned from your visit with Mr. Young—do you remember Dick Dowell and Bill Elgrett coming to your plant with another person?

A. Yes.

Q. You know Dick Dowell and Bill Elgrett, I take it?

A. Yes.

Q. Would you be good enough, please, to identify them.

A. Dick Dowell was president—I believe president, one of the owners of Cannery Sales Stores.

Q. And who was Bill Elgrett?

A. It is Bill Eggett.

Q. How do you spell it?

A. (Spelling) E-g-g-e-t-t.

Q. Yes, and what position did he hold?

A. He is a frozen food buyer for Utah Wholesale Frozen Foods.

Q. Who was the third man that they brought with them that day to your plant, within a couple of days after you [fol. 503] returned from seeing Mr. Young in California?

A. A frozen food broker from the Northwest.

Q. Who introduced him to you as a frozen food broker from the Northwest?

A. Dick Dowell.

Q. At that time did you have any interest in acquiring a frozen food broker in the Northwest?

A. Yes.

Q. And what do you refer to as the "Northwest," what station do you mean?

A. Washington and Oregon.

Q. Did the gentleman, this third gentleman, identify himself as a frozen food broker from the Middle West—or from the Pacific Northwest, rather?

A. Yes.

Q. Did you have a conversation with this gentleman when he first came in, this gentleman and Dick Dowell and Bill—Eggett, did you say?

A. Eggett.

Q. Eggett?

A. Yes.

Q. Did you have a conversation with him?

A. Yes.

Q. Where did that conversation take place?

A. In our plant.

Q. Would you be good enough to relate to the Court and jury the substance of the conversation you had with this gentleman who identified himself as a broker from the Northwest?

A. He was in Salt Lake City to look over—to try to obtain new companies in his trading area, or in the area he worked.

Q. You mean that is what he told you?

A. Yes.

Q. All right.

A. And he was interested in obtaining a frozen pie account, and he had heard that—he had heard about our company, and wanted to know if we was interested in shipping into the Pacific Northwest, and I told him "yes." And he told me that he would like to know a little bit about us as a company about our plant and our operation, have some background about it so he would be able to better represent us if we chose him to represent us in that territory.

So I proceeded to tell him a little bit about our operation, how we manufactured our pies. I introduced—or I took

him down and let Ross take him through the plant, along with me. Ross explained his machinery and our freezer and the process we make our pies, and so on.

Mr. Lamb: Your Honor, I move that this testimony be stricken on the grounds it is irrelevant, incompetent and immaterial with respect to the charges of conspiracy and with respect to the charge of territorial price discrimination.

The Court: The motion is denied.

[fol. 504] Mr. Lamb: It is also repetitious.

The Court: The motion is denied.

By Mr. Alioto:

Q. Approximately how long a time did this gentleman who identified himself as a broker from the Northwest spend in your plant talking to and inspecting the plant? Approximate it for us.

A. Oh, 40, 50 minutes.

Q. At this time had Safeway given you any direction? State whether or not Safeway had given you any direction with respect to whether or not you would pack pies for Safeway.

A. They gave us their formulas.

Q. When?

A. When I was in San Francisco in June.

Q. In other words, two days before this visit, approximately, as you have identified it.

A. Yes.

Q. They gave you the formulas and what else?

A. He told us to purchase fruit to manufacture—we told him that the crop was coming in for certain items of fruit and, to obtain a decent price on fruit, we always buy—contract our fruit ahead. And he said for us to contract fruit for his pies. We did so.

Q. Based upon that direction from Safeway, did you in fact go out and buy fruit to pack the Bel Air fruit pies?

A. Yes, sir.

Q. Did you buy anything else based upon that direction?

A. Nothing but fruit.

Q. Did the gentlemen—before this gentleman left the plant, this gentleman who identified himself as a broker from the Pacific Northwest, did he ever tell you that he was in fact an employee of the Pet Company?

A. No, sir.

Q. Did you know before this litigation started that he was an employee of the Pet Company?

A. No, sir.

Q. What was the next thing that happened, if you remember, on the Safeway matter after you bought the fruit for Safeway. What was the next thing that happened? Just state the facts on it.

A. We continued to correspond, trying to set a date when we could get into production. We had sent him quotation on our prices, and we just couldn't seem to get together. He would never give us a confirmed date that we could start packing Bel Air pies.

Q. Did you inform him that you had already bought the fruit pursuant to his directions?

A. Yes, sir.

Q. Did you ever get that Safeway order for fruit pies?

A. No, sir.

Q. What did you do with that fruit that you bought for the Safeway Company?

A. Used it in our other pies.

[fol. 505] Q. How long a period of time did it take you to use it up?

A. More than a year.

Mr. Alioto: Will you mark this for identification?

(Plaintiff's Exhibit No. 91 was thereupon marked for identification.)

Mr. Alioto: If your Honor please, we'll offer into evidence at this point an I.B.M. study made of the Utah Pie Company by Mr. Zimmerman, or by Professor Anderson, I'm not sure which, that sets forth all of the invoices of the Utah Pie Company and the information from the invoices

segregated as to the States of Utah, Idaho, Oregon, Spokane, Colorado, Wyoming, and others. We'll offer it in connection with the direct examination of this witness.

• • • • • • •

The Court: It's received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 91 for identification was received in evidence.)

Mr. Alioto: We'll offer into evidence as the plaintiff's exhibit next in order in connection with the direct examination of this witness a comparative statement of income of the Utah Pie Company for the years '57, '58, '59, '60, and '61, as shown on the books of the Utah Pie Company.

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(The exhibit marked Plaintiff's Exhibit No. 92 for identification was received in evidence.)

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[fol. 506] By Mr. Alioto:

Q. Now, you went into the frozen pie business first in August of 1957; is that correct?

A. That's correct.

• • • • • • •

By Mr. Alioto:

Q. Now, Mr. Rigby, was anybody else in your company during this period of time in charge of sales?

A. No, sir.

Q. In other words, you handled that entirely; is that correct?

A. Yes, sir.

Q. From '58 down to the filing of this complaint in '61?

A. Yes, sir.

Q. State the facts to the Court and jury with respect to what happened to your price structure beginning in 1958 and coming down to 1961, September of '61.

A. In 1958 our price was $4.15 a dozen. We, through competitive action, we was forced to lower our price to, I

believe, $4.00 the first time. And again we was forced to lower it to $3.70 a dozen. And then we—the last time we was forced to lower our price to any certain degree was in June of 1961, when we was forced to lower it to $2.75 a dozen. Then we raised the price back up, after I think about three or four weeks, we raised it back up to the old price. And then we were forced to lower it back down again to $2.90. And that's where our price has stood on apple pies until this date, $2.90 a dozen.

[fol. 507] Mr. Alioto: We'll offer at this time, if your Honor please, a study of price of the Utah brand and the Frost 'N' Flame brand of the Utah Pie Company covering the years 1958 down through 1961. This price study was taken off the invoices actually—they were prices paid by wholesalers for 8-inch frozen fruit pies on various brands, '58 to '61, and taken from the invoices of those wholesalers.

Mr. Lamb: Your Honor, I object to its introduction on the grounds that it's fragmentary, that it was removed piecemeal from a study otherwise known as the Dr. Anderson study. The documents yesterday were fragmentary documents; and this deprives the jury of an opportunity to examine the entire study which relates to market shares and to invoice prices in the Intermountain Area.

* * * * * * *

[fol. 508] Mr. Lamb: Your Honor, my objection is that it was removed from this document. It's fragmentary. The entire document should go in.

The Court: I take it you're going to introduce the whole document?

Mr. Lamb: Yes, I hope to.

The Court: Yes.

Mr. Lamb: If Mr. Alioto will stipulate it into the record.

The Court: We'll see when we get to it. It's received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 93 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, Mr. Rigby, this price study that's in evidence now as Plaintiff's Exhibit 93, if you would be good enough to look at it, you will note, for example, that the Utah brand starts out in January of '58 at $2.08. Now, you have been using a $4.15 price. Are your $4.15 and this $2.08 on the same basis?

A. Yes.

Q. Are they? Look at it again. In other words, $2.08 and $4.15 are about $2.07 apart? Now, what is the difference between those two prices?

A. I quoted a dozen price. This is a case price.

Q. Okay. Now, in order to get dozens from cases, you multiply the cases by two; is that it?

A. That's correct.

Mr. Alioto: This shows, ladies and gentlemen, that in 1958 is 208 cases, not a dozens. And this is a range of prices, and then a medium price. In January '58 it starts at $2.08, $2.15. Of course, converted to $4.30 a dozen. This is on apple. $2.15, $2.05, $2.04, $2.04, $2.04, $2.03, $2.00. Beginning of January, $2.04, $2.00, $2.04. It stays at $2.00. And down to $1.92 in August of 1959. $1.90 in September of '59, $1.88. In October of '59. $1.85 in November. $1.85 in December. In 1960 it opens at $1.85. Holds at $1.85. All the way down to April of '61. $1.84. May. $1.64 in June. $1.60 in July. $1.60 in July. $1.80 in September, $1.80 in September. $1.45 in December.

By Mr. Alioto:

Q. Now then, we've heard a good deal in this litigation [fol. 509] up to now about a Frost 'N' Flame label. Would you be good enough to tell us what the Frost 'N' Flame label is?

A. It's a private or controlled label that we manufacture for Associated Foods.

Q. Who owns the name, "Frost 'N' Flame"?

A. We do. The Utah Pie.

Q. Now, do you manufacture that—do you use that label in connection with anybody's business except Associated Foods?

A. Not in Utah and Idaho.

Q. Did you personally negotiate the Frost 'N' Flame label arrangement with the Associated Foods?

A. Yes, sir.

Q. What is the name of the person in Associated Foods with whom you negotiated?

A. Stanley Chapman.

Q. What was his position in Associated Foods?

A. At that time he was buyer of frozen food for Associated Grocers.

Q. Now, the Frost 'N' Flame, is it also a 24-ounce pie?

A. Yes, sir.

Q. And your Utah pie is also 24-ounces?

A. Yes, sir.

Q. Is there any difference between the two pies, so far as ingredients, crust, and the rest of the things that go into pies are concerned?

A. No, sir.

Q. Is there a difference in connection with the wrapper—or the box, rather?

A. Just different name, different color.

Q. But otherwise it's the same kind of a box?

A. Yes, sir.

Q. Do you get your Frost 'N' Flame pies through your machines as fast as you get your Utah pies through your machines?

A. Yes. sir.

Q. Approximately how long have you know Mr. Chapman, Mr. Stan Chapman?

A. I met Mr. Chapman for the first time in, I believe, the latter part of 1957 or the first part of—latter part of 1957.

Q. And he was at that time the buyer for Associated Grocers, you say?

A. Yes, sir.

Q. Did you have occasion to meet him any time in 1960?

A. Many times.

Q. Did you have occasion specifically to meet him at a time when he had announced he was going to leave Associated Grocers?

A. Yes, sir.

Q. Do you recall where it was that you met him?

A. Yes, sir.

Q. Where?

A. Crossroads Cafe.

Q. Who was present?

A. He and I.

Q. At whose invitation?

A. His.

[fol. 510] Q. Tell the Court and jury the substance of what was said at that time—oh, excuse me.

Mr. Schafer: Your Honor, I'd like to—

By Mr. Alioto:

Q. One other thing. Mr. Chapman, in 1961, what position did he hold? In 1961?

Mr. Schafer: I think you mean 1960, Mr. Alioto.

By Mr. Alioto:

Q. Well, in 1961 what was he doing?

A. He was a frozen food broker.

Q. For whom?

A. For himself. He represented Continental for one, and Minute Maid for another, and other companies.

Q. What frozen pie account did he represent?

A. Continental, Morton.

Q. The Morton Company. All right. Let's get back to this Crossroads conversation. At that time he was still with Associated Grocers; is that correct?

A. Yes.

Q. Would you be good enough to tell us the substance of that conversation?

Mr. Schafer: I object to this line of interrogation, your Honor, on the grounds of hearsay.

Mr. Alioto: The testimony already shows, if your Honor please, that the culmination of this conversation occurred on October 3. There is a letter in evidence stating that he had been appointed frozen food broker for Morton's as of September 26, before the culmination of the conversation. And I think it ties in directly to the Morton Company, the culmination of this conversation.

Mr. Schafer: It's perfectly obvious on the record, your Honor, that the September month is supposed to be October. That's a pure typographical error. It's all over the record.

Mr. Alioto: I don't think it's a typographical error.

Mr. Schafer: The facts of the matter are—

Mr. Alioto: I don't think so. There are going to be lots of facts on that question before we're through.

[fol. 511] Mr. Schafer: The facts of the matter are, your Honor, that Mr. Chapman could not possibly have negotiated to represent Utah Pie Company if he had been already in fact appointed by the Morton Company. You simply don't handle two competing lines of frozen pies.

Mr. Alioto: You can be talking to two different people, though.

Mr. Schafer: You stated that on September 26—you're claiming that on September 26 Chapman was already the Morton broker.

Mr. Alioto: That's correct.

Mr. Schafer: It's impossible to conceive that Mr. Rigby would have been negotiating with Mr. Chapman in respect of a broker, when he had already been appointed by Morton.

The Court: Oh, I don't think—

Mr. Schafer: Therefore I object on the grounds of hearsay.

The Court: Overruled.

Mr. Billings: Your Honor, may I note an objection on behalf of Carnation that this is hearsay.

Mr. Alioto: At this point, Mr. Billings, we are offering it only against Morton, or Continental Baking.

By Mr. Alioto:

Q. Tell the Court and jury the substance of that conversation.

A. He told me that he was leaving Associated; that he had already obtained a frozen juice account and told Associated that he was leaving; he was interested in obtaining a frozen pie account; he had been familiar with frozen pie records; he knew the volume that frozen pies had been sold in the Salt Lake area in the past; that he knew there was a great amount of money to be made in brokering frozen pies, of its great volume. He wanted to know if we would be interested in having him represent us in Utah and Idaho under our Utah Pie label and our Frost 'N' Flame label.

I told him I didn't know; that I would have to discuss it with the rest of the family, and we would let him know, which we did.

[fol. 512] Q. Now, is that the substance of everything that was said at the Crossroads?

A. I believe so.

Q. Can you fix the approximate time of this conversation?

A. Oh, late September, early October of 1960.

Q. When was the next time you saw him?

A. About three or four days or a week later.

Q. And where?

A. In the office of the Utah Pie.

Q. And who was present?

A. My father and my uncle, myself, and I believe two or three of my cousins. I'm not sure.

Q. Was Mr. Chapman there?

A. And Mr. Chapman.

Q. Tell us the substance of the conversation that took place on that occasion.

A. I had explained to him, being that I was spokesman for the group, that we didn't think it was possible that he could represent us with his private label, because there was not money enough in it for a brokerage; we did not allow any brokerage fee in the Frost 'N' Flame label. And he said that could be remedied. We told him that we had planned on raising the price of our apple pie anyway, because the cost of fruit had gone up. He said: "Raise it a little more, and the difference will compensate for the brokerage, and the increased volume that I get for you will more than offset the difference in the price."

And I told him that I didn't think we could do that, because Associated knew what our prices were to them. And he said he was the only one that had access to the records and he was the only one that knew the price of the pie and that they wouldn't even look into that after he had left.

We told him we would think about it and let him know.

Q. Is that the substance of everything that was said on that occasion?

A. I think so.

Q. Did you then contact him later?

A. Yes, sir.

Q. About how long after?

A. Oh, a few days, three or four days, or a week.

Q. What was the nature of the contact? Was it telephone or face to face?

A. Telephone.

Q. You called him?

A. Yes, sir.

Q. Tell us the substance of what you told him.

A. I told him that we could not go along with his—first, I told him we could.

Q. In the first telephone conversation?

A. Right.

[fol. 513] Q. Now then, was there a subsequent telephone conversation with Mr. Chapman?

A. You mean a later one?

Q. Yes.

A. Yes.

Q. As a matter of fact, "later" is a better word than "subsequent." Now, between these two telephone calls, and without telling us the conversation, but between these two telephone calls did you get a telephone call from the then buyer for Associated Foods?

A. Yes, sir.

Q. And what was his name?

A. Claud Purles.

Q. Say it again?

A. Claud Purles.

Q. Claud Purles. That's P-u-r-l-e-s; is that correct?

A. That's correct.

Q. All right. And Mr. Purles presently lives in Salt Lake City.; is that correct?

A. Yes, sir.

Q. Now without telling us what conversation took place between you and Mr. Purles, did you then again call Mr. Chapman?

A. Yes, sir.

Q. Can you fix the approximate time that you talked to Mr. Chapman this last time?

A. The middle of October, something.

Q. October. Now, did you call him?

A. Yes, sir.

Q. Tell us the substance of the conversation you had with him then.

A. I told him that we had heard from Claud Purles. That he objected to the fact that we had raised the price of our pie to pay him a brokerage. That Associated Foods would not stand for it. That he was representing Associated Foods and was interested in their interest. And he could see a difference in the price. That he wouldn't stand for such arrangements.

Q. You told this to Mr. Chapman?

A. Yes, sir.

Q. Then what did Mr. Chapman tell you?

A. He became very angry and said that it was too bad that we had made this decision, for he was going to obtain another frozen pie account, one that was a national brand; that he was going to get us as Utah Pie.

And I told him I was very sorry that he felt this way, but there was no other choice, we had no other alternative but to tell him to—tell him that we could no longer have him to represent us. And then he repeated his angry words that we was going to be sorry, that he was going to get us. And then I hung up—or, we said goodbye and hung up.

Q. Now, Mr. Rigby, have you had a chance to look at the Morton invoices in this case before this moment?

A. Yes, sir.

Q. As a matter of fact, were you the person that went [fol. 514] through all of the Morton invoices and segregated them in the form in which they now appear in Plaintiff's Exhibit 87, for an example?

A. Yes, sir.

Q. In addition to that, I take it you had analyzed—or had you seen—state whether or not you have seen the financial records of your own company, as prepared by Mr. Zimmerman?

A. I don't think I have.

Q. That's Plaintiff's Exhibit 92.

A. I haven't seen it.

Q. You haven't had an opportunity to check this exhibit at all?

A. No.

Q. Have you personally seen the financial records of your own company; that is, in the form of statements, income statements or balance sheets of the Utah Pie Company?

A. I've glanced at them, yes.

Q. Have you had occasion to analyze the market share study that was prepared by Dr. Anderson, which is Plaintiff's Exhibit 62 in evidence?

A. I've looked at it, yes.

Q. Have you examined any of the budget records of the Pet Company and the Carnation Company that have been introduced into evidence in this case?

A. I've glanced at them.

Q. Have you ever made studies inside your own organization with respect to the difference in the production of the 24-ounce pie as distinguished from the 22-ounce pie?

A. Would you repeat the question again, please?

Q. Have you ever made studies or have you ever asked that members of your own organization make studies with respect to the difference between the 24-ounce pie and the 22-ounce pie?

A. Yes, sir.

Q. Are you generally familiar with the markets, the so-called Intermountain pie markets, as a basis of your experience?

A. Yes, sir.

Q. Now, on the basis of that experience and the examination of these documents and everything you know about the pie business, do you have an opinion as to the sales volume that Utah Pie Company would have achieved in 1959, 1960, and up to August 31, of 1961, on the assumption that there had been—and make this assumption for the moment—that there had been non-discriminatory pricing and there had been pricing above cost? Do you have such an opinion?

A. Yes.

Q. And have you prepared a written statement setting out your opinion with respect to the volume lost as a result of discriminatory pricing or sales below cost?

A. Yes, sir.

Q. I show you a document, and ask first that it be marked for identification.

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[fol. 515] By Mr. Alioto:

Q. I show you a document which has been marked Plaintiff's Exhibit 94 for identification and ask you if that is the estimate prepared by you of the volume lost due to the discriminatory pricing and sales below cost.

A. Yes, sir.

Q. Have you prepared this document in accordance with specific marketing territories?

A. Yes, sir.

Q. Do you believe on the basis of your total experience in this industry, on the basis of the examination of whatever documents you have looked at, including the various studies in this case, do you believe that that document accurately sets forth an estimate of the volume lost by Utah Pie Company as a result of the pricing activities of these defendants?

A. At least this many.

Mr. Alioto: We'll offer it into evidence.

Mr. Lamb: Before it's received, your Honor, I'd like to ask a few questions.

Voir dire examination.

By Mr. Lamb:

Q. Mr. Rigby, do you know what "sales below cost" is?

A. I think so.

Q. What is it?

A. Sale below the cost.

Q. What is the cost.

A. The cost of manufacturing, selling, freight, and everything that goes into the pie before you sell it. If you sell it below what it costs you to manufacture and sell, and freight and so on.

Q. Do you know what "gross profit" is?

A. I believe so.

Q. Now, Mr. Rigby, who prepared this document for you?

A. I prepared it.

Q. Where did you get the figure, "Sale Lake Division Bel Air 1959"—where did you get the figure 25,462?

Mr. Alioto: If your Honor please, this is cross examination. The jury doesn't know what the document shows yet.

The Court: I think this is cross examination.

By Mr. Lamb:

Q. You had no assistance from your counsel in preparation of this document?

[fol. 516] A. I wrote these figures. I got these figures, yes.

Q. Where did you get the figures?

A. From the documents that's been handed in on the case.

Q. Can you tell me what documents?

A. Yes.

Q. I'd like to hear about it.

A. On the one you just referred to, from Dr. Anderson's study.

Q. Did all of the information contained on this document come from Dr. Anderson's study?

A. No, sir.

Q. Where did the rest come from?

A. Invoices of Continental, some from my own knowledge of the pie business. Mostly from that.

Mr. Lamb: Your Honor, I object to the introduction of this document on the grounds it is highly speculative, it is clairvoyant, the witness is not qualified to guess, and that there is better evidence on this subject.

Mr. Schafer: May I, your Honor, ask a few questions on voir dire before stating an objection?

The Court: In the first place, I am going to overrule Mr. Lamb's objection. Now, go ahead.

Voir dire examination.

By Mr. Schafer:

Q. Mr. Rigby, I don't understand what these figures purport to be. Could you explain it to me? Where did you get those figures?

A. Fifty-two thousand—

Q. No, don't read them, please. Where did you get those? What is the source of those figures?

Mr. Alioto: He has already explained that, if your Honor please.

Mr. Schafer: I didn't understand it.

A. From Morton invoices.

By Mr. Schafer:

Q. Just the total—

The Court: Are you asking the same questions Mr. Lamb asked?

Mr. Schafer: I wonder whether or not it is just a total of the Morton invoices, and he has just said it was. Is that correct?

[fol. 517] The Witness: The total?

By Mr. Schafer:

Q. Is it a total of the Morton invoices?

A. No, sir.

Q. What is it?

A. It is a percentage of Morton's invoices.

Q. What was the basis for the selection?

A. What do you mean?

Q. Why did you select some invoices and not other invoices?

Mr. Alioto: He didn't say he did that.

A. This is based here on the actual—on the sales I feel we should have made in the Denver area.

By Mr. Schafer:

Q. By looking at the Morton invoices?

A. No, not just by looking at the Morton invoices, but by taking all the evidence and papers we have been able to obtain through this litigation and through my own knowledge of what Utah Pie sold in Denver in 1959. If we had been able to compete there in a manner where we would all have a share of the market, I feel that we would have sold at least this many pies in Denver in those years.

Q. Did the Morton invoices have anything to do with getting this number?

A. Those actual figures, no, sir.

Q. They don't have anything to do with it?

A. No.

Mr. Schafer: Well, then, your Honor, I object. This is purely speculation, self-serving. He is not at all competent to testify as to why he lost sales in Denver or anyplace else. It is pure hearsay.

Mr. Alioto: I submit it, if your Honor please, on that objection. Ramsey against Associated against Associated Bill Posters in 42 Fed. 2d, and right down to date in this Tenth Circuit in Union Carbide vs. Nisley, the courts have held that the owner of a business is competent to testify concerning his opinion of damages. The statement of the Court of Appeals of the Tenth Circuit is as follows:

"We know that loss of profits and diminishing of assets are proper elements of damage, and we know, too, that the owner of the affected business is competent to testify concerning his opinion of damages."

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[fol. 518] Mr. Schafer: Your Honor, I would submit that authority is not authority for admitting this piece of paper. This is a statement of what sales he lost.

The Court: That authority is pretty good authority.

Mr. Schafer: No.

The Court: He is the owner of the business.

Mr. Schafer: Yes, your Honor, but he is here being asked to testify that he lost "X" amount of sales. In other words, he is being put in the place of the buyers. He is saying, "These buyers would have bought my product but for certain things."

Mr. Alioto: That is correct.

Mr. Schafer: That is exactly what this is, and that case is not authority for that at all. It is pure hearsay.

Mr. Alioto: That is exactly what they were talking about in that case.

Mr. Schafer: It is pure, self-serving hearsay, your Honor.

The Court: The objection is overruled.

Mr. Billings: Your Honor, I haven't said anything yet. I would like to voir dire the witness on another matter.

The Court: We have had enough voir dire.

Mr. Billings: What?

The Court: We have had enough voir dire.

Mr. Billings: I am not going to duplicate anything the other counsel have asked.

[fol. 519] The Court: All right. Don't duplicate it. If you do, you are going to get stopped.

Voir dire examination.

By Mr. Billings:

Q. Mr. Rigby, with respect to the item on this proposed Exhibit 94, you say, "as per Exhibit 62" on here?

A. Yes, sir.

Q. And I show you now Exhibit 62 and ask you where in Exhibit 62 you got the three figures that are shown on this Exhibit 94.

A. Well, on this Exhibit 62, with the assistance of our accountant, we figured up our percentage of the market, and each year our percentage diminished.

Q. Just a minute. You figured up the percentage of the market?

A. Yes.

Q. Say for 1958, that is the first year of Exhibit 62?

A. Yes.

Q. Is that correct? Did you include every seller in this market shares study, which is Exhibit 62, in computing that percentage?

A. No, sir.

Q. What sellers did you consider?

A. Utah Pie, Carnation, Morton, and Pet, and Swiss Miss.

Q. Did you include the so-called private brands?

A. No, sir.

Q. You did not, even though they might have been made by Utah Pie or Pet, is that correct?

A. That's true.

Q. So in computing these figures you only used the sales by Carnation, Morton, the Utah Pie brand, the Swiss Miss brand, and the Pet-Ritz brand, is that correct?

A. That is true.

Q. And you didn't use any of the other sellers in the market?

A. You mean the other brands?

Q. The other brands in the market.

A. Yes, we used those.

Q. But you didn't use the private brands of either yourself or—

The Court: What is the use of repeating that?

Mr. Billings: I just wanted to make it clear.

The Court: This lawsuit is being unduly prolonged by repetition.

Mr. Billings: On that basis, your Honor, I object to this document, and particularly the portion which purports to be taken from Exhibit 62, on the basis that it mis-
[fol. 520] represents the facts as shown in Exhibit 62, and it deliberately does so.

The Court: And what?

Mr. Billings: Deliberately does so, your Honor.

* * * * * * *

The Court: Your objection is overruled.

Direct examination.

By Mr. Alioto (continued):

Q. Now, this document is your estimate of sales you would have had broken down by areas, is that correct?

A. That's true.

Q. Now, on the basis of what you know about your own business, namely, the Utah Pie business, would you be good enough to state whether or not it would be necessary to hire any additional administrative personnel in the event you had the sales you estimate you would have had?

A. No, sir.

Q. Would it be necessary to hire any additional executive personnel in order to fulfil these sales?

A. No, sir.

Q. Would it have been necessary to buy any new machinery for your plant?

A. No, sir.

Q. State whether or not you had the productive capacity in your plant in these years to handle this additional business—

[fol. 521] A. Yes, sir.

Q. (Continuing) —had you had this volume?

A. Yes, sir.

Q. Now, one of the estimates you have made here—

Mr. Alioto: It is just above, if you had looked at it.

Q. (Continuing) —is the Salt Lake Division Bel Air. It is an estimate of what you would have had from Safeway, based upon your experience, is it not?

A. Yes, sir.

Q. And that is a private label, isn't it, Bel Air? That is a private label, isn't it?

A. Yes, sir.

Q. Now, you look down at the Denver Division. You have made an estimate of what you would have had, so far as

the Bel Air pies are concerned had you had the Safeway contract in accordance with the conversations with Mr. Young, is that correct?

A. That is correct.

Q. And that Bel Air in Denver is a private label?

A. Yes, sir.

Q. In addition to the loss of volume that you have estimated here, state whether or not your company sustained any other type of damage, any other type of loss, in the period from '58 to '61?

A. Yes, sir. Besides—

Q. State the facts with respect to that.

A. Well, we have these two here we have talked about—

Mr. Schafer: May I interrupt to ask the meaning of the question, your Honor?

The Court: I think the question is perfectly clear: Did they have any other elements of loss other than what we have discussed.

Mr. Schafer: My question was: by reason of these alleged violations, or just generally?

Mr. Alioto: By reason of these alleged violations, but you would scream that that would be a conclusion if I asked it that way. I am just talking now about losses or damages, and the violation, the jury will decide that.

Mr. Schafer: I would submit, your Honor, that a general loss discussion is irrelevant to the case.

The Court: Don't worry, I suspect it will be tied up.

[fol. 522] A. We have first the loss in the price of the pies we should have had; secondly, the pies that we could have made and should have made if we hadn't had these price differences; and, thirdly, there was a loss of good will to a going concern, of a business that was growing, and had all the elements of a business that could expand into other areas, being that we had an advantage here because of our location, our freight, our low overhead, our low production costs and all these other things. We feel we were damaged in this manner.

Q. But do you have an opinion, Mr. Rigby, with respect to the amount of damage suffered by the Utah Pie Company in connection with its good will as a going concern?

A. Yes, sir.

Q. During this period of time?

A. I do.

Q. What is that opinion?

A. $75,000.

* * * * * * *

[fol. 523] GRANT CALDWELL, recalled as a witness on behalf of the plaintiff, having been heretofore duly sworn, testified further as follows:

Direct examination.

By Mr. Alioto:

Q. Mr. Caldwell, did you at my request prepare a series of mathematical computations based upon certain evidence and records which are in evidence in this case?

A. Yes.

Q. All right. Now, I show you a chart, a copy of which was given to defendants yesterday. I show you a chart. Let's put it this way for the moment. May the record show that the chart is being placed away from the jury, so it's not visible to the jury. I show you a chart, Mr. Caldwell, and ask you to state if that is the compilation which you prepared at my request from the records in evidence in this case.

A. Yes, sir.

Q. And to the best of your knowledge, does it accurately represent the facts in evidence as stated in evidence and in the case, of computations does it accurately set forth the results of the computations you have made?

A. Yes, sir.

Q. And do you have with you the background material from which you made the computations set out on this chart?

A. Yes, sir.

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(Plaintiff's Exhibit No. 95 was thereupon marked for identification.)

The Court: Where did you get those fancy stickers? This is the first time I've seen them.

[fol. 524] Mr. Alioto: Pretty fast the way they go on.

The Court: You must have more budget than I thought you had.

By Mr. Alioto:

Q. Mr. Caldwell, is this basically a chart which sets forth computations based on a loss volume, depressed price, and value of good will?

A. Yes, sir.

Q. Is that basically what it is? And to the best of your knowledge, all of the figures contained therein are accurate?

A. Yes, sir.

Mr. Alioto: We'll offer it in evidence, if your Honor please.

• • • • • • •

Voir dire examination.

By Mr. Schafer:

Q. How do you define "gross profit", Mr. Caldwell, that appears on here?

A. Sales less the cost of goods manufactured, and in certain instances it includes freight as a cost of goods sold item where it's indicated that the sale is outside of the Salt Lake Area. That would be in the case of the Seattle, Spokane, and Portland areas and in the case of the Denver, Colorado area.

Q. But not in respect to Category A?

A. No, sir.

Q. Category A "Gross Profit," simply means the estimated sale price less the cost of goods to be sold?

A. Yes, sir.

Q. Now, can you explain in your own words, sir, what the basis for this "A" category is?

Mr. Alioto: Well, if your Honor please, I would suggest that if we can proceed—we're going to put the exact basis into evidence, in the form of additional studies, which were just completed and given counsel.

[fol. 525] Mr. Schafer: I don't mean my question to inquire as to where the numbers come from.

Mr. Alioto: The formula?

Mr. Schafer: Yes, the formula, if you will.

Mr. Alioto: Okay. Well, we can explain that as a matter of evidence, but—

The Court: I don't know why we have to do this on voir dire.

Mr. Alioto: Yes.

Mr. Schafer: I would submit, to your Honor, if I'm right in my understanding of what the basis is, it's inadmissible.

The Court: Well, I have some confidence in counsel in this case. I think that it would be a fair chance that, if we proceed with it, it might get into evidence; but if it doesn't —if we got it in improperly—you've got your motion to strike, and it would save a lot of time. This looks like cross examination.

Mr. Schafer: All right.

Mr. Alioto: I would think so.

The Court: It looks like cross examination.

By Mr. Schafer:

Q. Can you tell me, sir, the source of your information as to the cost of goods manufactured?

A. For Utah Pie Company, it's based upon a schedule which was prepared by Mr. Zimmerman.

The Court: Mr. Zimmerman was employed by whom, Mr. Schafer?

Mr. Schafer: He was employed by the defendants, your Honor.

The Court: All of the defendants, the three defendants?

Mr. Schafer: All three defendants jointly.

By Mr. Schafer:

Q. Is this the study, sir (handing)?

[fol. 526] A. Yes, sir. This is the basis of the study; and as far as the flavor mix is concerned, I was—the flavor mix was obtained from the market survey made by Dr. Anderson and Dr. Lambourne for the defendants, and the flavor weight average has been used in arriving at the cost.

Q. You used the cost—

A. It's based upon these figures, however.

Q. When you say "these," you're pointing to the figures listed under—I'm going to mark this as an exhibit—under Mr. Zimmerman's cost analysis?

A. Yes, sir, that is correct.

Q. And then you worked out a flavor mix taking the sales of the Utah Pie Company as shown by that market share survey made by Dr. Anderson?

A. That is correct.

Mr. Schafer: I'd like to have this marked as Morton's next exhibit number.

(Defendant Morton's Exhibit No. M-16 was thereupon marked for identification.)

Mr. Alioto: We have a pending offer, if your Honor please, to receive this document into evidence.

Mr. Schafer: I would object, your Honor, on the grounds of incompetency.

The Court: Overruled, and the exhibit is received in evidence.

Mr. Lamb: I'd like to have the same objection noted, your Honor.

The Court: Yes.

Mr. Billings: For our three, your Honor.

The Court: Yes. Same ruling. The objection is overruled. It's received.

(The exhibit marked Plaintiff's Exhibit No. 95 for identification was received in evidence.)

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[fol. 527] By Mr. Alioto:

Q. Now, Mr. Caldwell, speaking loud enough so that all of the attorneys in the case can hear you, would you be good enough to take this pointer—and step back from the exhibit, so it might be seen by the members of the jury—and explain exactly what—first of all, tell us generally what this Exhibit 95 is; and after that, we'll ask questions specifically about each of the categories you have listed.

A. Under "Item A" as shown on the study, we determined the percentage of the market for other than private label pies that was sold by each of the defendants and the plaintiff. For each of the years 1958 through 1961, we determined the percentage increase or decrease in that market for each of the defendants and the plaintiff. We then used 1958 as a base year.

If Utah Pie Company had maintained its market position which it had in 1958 through the years 1959, 1960, 1961, in relation to the other defendants, then there would have been an increase in number of dozens sold. After computing the additional number of dozens which would have been sold, we have determined the Utah Pie Company's actual cost of manufacture, as indicated on the schedule of Mr. Zimmerman, have applied the flavor mix as indicated in the market survey, to come up with a weighted average cost in applying against the sales price on the additional dozens which would have been sold at four various prices: $4.30 per dozen, $4.10 per dozen, $3.90 per dozen, and $3.70 per dozen.

This figure here indicates the difference between the sales price at these amounts, less the cost of manufacturing, which remains constant for each category.

Therefore, this is the additional gross profit by defendant that Utah Pie would have received had their market position remained the same as it was in 1958.

Under Item B, the determination of the amounts as shown here for each defendant was determined in exactly [fol. 528] the same way. However, it's predicated upon 23,000 additional dozen that—if they had been sold in the Seattle, Spokane, Portland areas by Utah Pie Company—

Q. Where did you get that 23,000 dozen figure, Mr. Caldwell?

A. That was supplied *by* me by you. There has been a freight factor added to the cost of sales, based upon 30 cents per dozen going into the Seattle, Spokane, Portland Areas which has been subtracted from the selling price in arriving at these figures.

Under Item C, the determination has been made in exactly the same manner. However, it's based upon 231,500 additional dozen pies, if they had been sold in the Denver, Colorado area.

Q. Now, where did you get that Denver, Colorado figure, Mr. Caldwell?

A. That figure was supplied to me by you, sir.

Q. Okay.

A. We have added 20 cents per dozen to the cost of sales, since there would be a freight factor in the Denver, Colorado area.

Under Item D we have made a computation exactly in the same manner as we did under the first three on 58,088 dozen being sold to the Salt Lake City division of Safeway Stores, and 90,000 dozen being sold to the Denver division of the Safeway Stores. In determining the sales price in this connection, we have used the prices per dozen as set forth in the Safeway contract, which Pet had with that company.

We have used the actual cost of manufacture. And since those prices in the Safeway contract were quoted f. o. b., we have added to the gross profit factor the differential between the freight from Salt Lake City into Denver as

compared with the freight from Fresno, California, to Denver.

Under Item E, this is the additional revenue the Utah Pie Company would have received on private label sales if prices had been equivalent to Safeway contract prices. We have merely determined the number of dozen, and the net proceeds received by the Utah Pie Company from the sale of private label pies, which would include the Frost 'N' Flame, the Mayfresh, and the Sonny Boy, and have applied to the dozens sold the prices set forth in the Safeway contract. This represents the difference between what they actually received and what they would have received had those prices been equivalent to those set out in the Safeway contract.

[fol. 529] Under Item F, this is the additional revenue Utah Pie Company would have received on Utah Pie brand sales if prices had been as follows:—

In this determination we have determined the dozens sold and the net proceeds received by Utah Pie Company on their Utah brand sales, multiplied the dozens sold by these various prices, and subtracted each total from the actual proceeds received by Utah Pie Company.

This represents the difference.

Under Item E, this amount was supplied to me by Mr. Alioto.

Q. You said "Under Item E."

A. G.

Q. Are you reading that correctly? Let me turn it for you.

A. Item G.

Q. Item G. Where did the $75,000 figure in Item G for good will and going concern value—you received that figure from me, did you not?

A. Yes, sir. The grand totals, of course—this is the grand total, if all categories of the 4.30 per price are set forth on the schedule, is accumulated with the other items that remain constant, and this is the 4.10 price, 3.90 price,

3.70 price, with the other items on the schedule remaining constant.

Q. Mr. Caldwell, I want to get some explanation now of the different prices. These do not purport to be cumulative damages, do they? They are alternate figures.

A. Yes, sir.

The Court: What is this? I didn't understand that.

Mr. Alioto: At the bottom, the grand totals at the bottom of the page, if your Honor please, one is predicated upon a price of 4.30.

The Court: Oh, yes, I see.

Mr. Alioto: Should the jury determine from all the factors that that should be the price to be applied.

The other is predicated down to a range of 3.70, so that the acceptance of one would automatically reject the others.

[fol. 530] By Mr. Alioto:

Q. Is that correct so far as these prices are concerned?

A. Yes, sir.

Q. Now, Mr. Caldwell, do you have with you the background, or studies that set out the background, for the various categories from A to F?

A. Yes, sir.

Q. Would you be good enough to hand me those categories, please, Mr. Caldwell.

(Documents handed to counsel.)

By Mr. Alioto:

Q. I show you, Mr. Caldwell, a document which has been marked 96 for identification in this case. Would you be good enough to take it and state what it is in relation to our Exhibit 95.

A. First of all, we have referred to the market share and price study prepared by Dr. Anderson and Dr. Lambourne. We have determined the number of dozens.

Q. Excuse me. That market share study of Dr. Anderson's you are talking about is Plaintiff's Exhibit 62 in this case in evidence, is it not?

A. Yes, sir, that is the portion of the study which we used.

* * * * * * *

A. (Continuing) We have determined the number of dozens of frozen pies sold by each of the defendants and the plaintiff, other than the private label pies.

By Mr. Alioto:

Q. Now, this is the detail, is it not, the detail for Paragraph A of Exhibit 95, is that correct?

A. Yes, sir.

Q. To the best of your knowledge, Mr. Caldwell, does that Exhibit 96 accurately set forth all of the figures which it purports to set forth?

A. Yes, sir.

[fol. 531] Mr. Alioto: We will offer it in evidence, if your Honor please.

* * * * * * *

[fol. 532] Mr. Alioto: Your Honor, I haven't objected to this eloquent use of the word "arbitrary," and "statistical monstrosity." Counsel knows they are argumentative, and I make a motion that they be stricken. If the objection is relevant, materiality, competent, or no proper foundation laid, that can be stated.

The Court: The motion is granted. Those highly descriptive terms are stricken from the record.

Mr. Billings: Your Honor, with respect to this proposed Exhibit 96, I should like to object on behalf of Carnation Company on this ground: that this purports to take from Exhibit 62 solely private label brands, and Carnation Company is the only part to this—Carnation and Morton both, I guess it is true—do not have private label brands. Secondly, it does not take the other sellers in the market, as shown by the other exhibit in evidence, so that for the

years, for example, of '59, '60, and '61, half of the plaintiff's sales are in the Frost 'N' Flame brand, so that this misrepresents, with respect to Carnation Company, the plaintiff's share of the market. On that ground I object that it is misrepresentative as to the relationship between the plaintiff and the defendant Carnation Company.

Mr. Schafer: I want to make the same objection as to Morton, your Honor. I think it distorts the picture of the Utah Pie Company. It excludes about half of the sales.

The Court: Objection overruled.

Mr. Lamb: Same objection for Pet, your Honor.

The Court: The objection is overruled.

By Mr. Alioto:

Q. I show you now, Mr. Caldwell, Plaintiff's Exhibit 97 for identification, and that purports to be the underlying material for Paragraph B of Exhibit 95. Will you be good enough to state very generally and concisely what that is.

A. It shows the number of dozens sold in each of the periods, the detailed computation of the various selling prices used, the range from 4.30 to 3.70, the cost of sales indicating the freight factor which has been added in, and the resulting gross profit.

Q. To the best of your knowledge does it accurately reflect the underlying material for Paragraph B?

A. Yes, sir.

[fol. 533] Mr. Alioto: We will offer it in evidence, if your Honor please.

* * * * * * *

Voir dire examination.

By Mr. Schafer:

Q. Mr. Caldwell, I simply don't understand—there is a caption here, "Distribution to Defendants."

A. Yes, sir.

Q. What is the basis for making that distribution you show there?

A. That distribution was made upon the basis of information furnished me by Mr. Alioto.

Q. What information?

A. Instructions.

Q. Instructions?

A. Yes, instructions to use the 40-40-20.

Q. Not information, but instructions?

A. Yes. He told me to use those percentages, yes, sir.

Mr. Schafer: I will object on that ground, your Honor.

The Court: The objection is overruled.

Mr. Billings: I will object on the same ground, your Honor, on the ground there is no evidence in the record to support any such allocation.

The Court: The objection is overruled.

Mr. Lamb: If your Honor please, when in this presentation will we be privileged with knowing where Mr. Alioto got the figures that he has turned over to his accountant?

Mr. Alioto: I have turned over to Mr. Caldwell our figures which, for example, when he said I told him the Denver volume, they are in Exhibit 94. We start there. These prices we are talking about from 4.30 down to 3.70 are prices which are in the record which counsel has given to us. All of these things will be explained to the jury, and they will have an opportunity to know exactly where they came from, and they are all from the evidence in this case.

It seems to me, if your Honor please, that we can go on [fol. 534] and go on, and they can cross-examine on these matters, so that we can move along. No sense in our arguing here and my telling them what the evidence is. We are going to tell the jury.

Mr. Lamb: If your Honor please, I have no desire to argue with counsel. All I would like to know is the source of the 23,000, the 231,500, the 58,088, and the 90,000 in order to enable us to properly cross-examine when the time comes.

Mr. Alioto: Didn't you read Plaintiff's Exhibit 94 in evidence? Didn't you read it? You have a copy of it.

The Court: You are going to get—you are going to be told here shortly, I imagine. In the meantime I am going

to move it along, overrule your objections, receive these exhibits. I don't think I indicated the supporting data for Item A was received. It is received.

(The document marked Plaintiff's Exhibit 96 for identification was received in evidence.)

The Court: And now we are down to B, and that is received. The objections are overruled.

(The document marked Plaintiff's Exhibit 97 for identification was received in evidence.)

The Court: Now, you are down to C, I take it.

Mr. Alioto: Yes.

Direct examination (continued).

By Mr. Alioto:

Q. I show you Exhibit 98, which purports to set down the underlying data for Item C. Would you be good enough to state concisely, Mr. Caldwell, what that Exhibit 98 is?

A. It shows the additional dozens shown by year, based upon the computation in Item C, 231,500 dozen. It indicates the sales prices, and the range of prices as set out on the summary. It indicates the cost of sales for each year and the resulting gross profit for the range of sales prices used.

Q. Are the computations therein set forth correct, to the best of your knowledge?

A. Yes, sir.

Q. And is the information accurate, to the best of your knowledge?

A. Yes, sir.

[fol. 535] Mr. Alioto: I submit, if your Honor please, our exhibit next in evidence, 98. We will offer it.

The Court: That is supporting C?

Mr. Alioto: That is correct, supporting C.

The Court: Any objection?

Mr. Schafer: May I ask one voir dire question I should have asked earlier?

Voir dire examination.

By Mr. Schafer:

Q. Mr. Caldwell, in figuring your product mix, is that a conglomerate of all four years?

A. No, it is by year.

Q. You get a different product mix every year?

A. Well, except there is some of these schedules where the actual flavor and actual price has been used, without getting into product mix.

Q. I'm talking now about when you figure your cost of goods sold.

A. Yes.

Q. I understood you to say you figured that on a product mix basis drawn from the Anderson study.

A. Yes, sir, that is correct.

Q. And you used a different product mix formula for each of the years?

A. Yes, based upon the flavors as indicated in the Market Research Study.

Q. It would be different every year, then?

A. Yes, sir.

Q. Now, then, did you tell me that in some of the schedules there you didn't use a product mix?

A. Well, for example, on the private label sales of Bel Air we were able to actually use the specific flavors in the computation, as indicated in the schedule.

I might add that by weighting the cost of sales by flavor, that it doesn't make over two cents difference for fluctuation between any of the years.

Q. Except, then, for Category E, did you use the product mix formula for the other categories?

A. Yes, sir.

[fol. 536] Mr. Alioto: Pending offer, if your Honor please.

Mr. Schafer: I just have the same general objection to incompetency, your Honor.

The Court: Objection overruled, received in evidence.

(The document marked Plaintiff's Exhibit 98 for identification was received in evidence.)

Direct examination (continued).

By Mr. Alioto:

Q. I show you now Exhibit 99, which purports to be the underlying detail for Paragraph D of Exhibit 95. Would you be good enough, concisely, Mr. Caldwell, to state what that is.

A. It indicates the additional dozens of the Bel Air brand projected to have been sold in the Salt Lake area and the Denver Division of Safeway by year. Each division is set out separately. The price per dozen for each of the flavors, pursuant to the Safeway contract, are set out separately. The cost of sales of Utah Pie Company for each of their flavors is set out separately, and we have indicated the add-back to gross profit, taking into consideration the freight advantage, as previously explained.

Q. To the best of your knowledge, Mr. Caldwell, are the computations and the figures therein set forth accurate?

A. Yes, sir.

Mr. Alioto: We will offer it into evidence, if your Honor please. We have offered into evidence—there is a pending offer on Exhibit 99.

Mr. Schafer: Continental has the same objection.

Mr. Lamb: Your Honor, may I ask where the 40-30-20 came from in the Denver Safeway Division?

The Court: Yes, go ahead. Will you help him?

The Witness: I believe, sir, that it is indicated on a previous exhibit which Mr. Alioto handed me a moment ago.

Mr. Lamb: What is the source of it?

Mr. Alioto: Ask the witness the question so I can see what you are talking about.

[fol. 537] Mr. Lamb: Mr. Caldwell, will you tell me—under the heading "Denver Safeway Division, 1959, 1960,

1961," forty thousand, thirty thousand, twenty thousand, showing a total of ninety thousand."

The Witness: Yes, sir.

Mr. Alioto: May the record show that the witness has just handed counsel Exhibit 94, which was placed in evidence this morning—this afternoon, during the testimony of Mr. Gaylen Rigby.

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The Court: I think it will be illuminated. The objection is overruled. It is received in evidence.

(The document marked Plaintiff's Exhibit No. 99 for identification was received in evidence.)

By Mr. Alioto:

Q. I hand you now, Mr. Caldwell, Exhibit 100, which purports to be the underlying information, data, and computations in detail with respect to Paragraph E on Exhibit 95. State concisely, if you will, please, what that is.

A. It indicates by year the dozens and net sales proceeds of private label pies sold by the Utah Pie Company. The dozens have been multiplied by the prices set forth in the Safeway contract by flavor and the difference between the result by multiplying the prices pursuant to the Safeway contract, times the dozens, has been subtracted from the actual proceeds received by the company, and the differences indicated.

Q. Will you be good enough to state whether or not, to the best of your knowledge, the figures set forth therein are accurate and the computations are correctly made?

A. Yes, sir.

Mr. Alioto: We will offer Exhibit 100 into evidence, if your Honor please.

[fol. 538] Mr. Billings: May I ask the witness a question on voir dire, your Honor.

The Court: Yes.

Voir dire examination.

By Mr. Billings:

Q. Mr. Caldwell, over in the righthand corner of Exhibit 100 you have "Distribution to Defendants" with an asterisk, "Based on Market Share Study."

A. Yes, sir.

Q. What percentages have you inserted in there?

A. The total increase in the market by defendant in relation to the plaintiff.

Q. In other words, you used the same percentages that you used in Exhibit 96?

Mr. Alioto: I will hand the witness—

A. Yes, sir. I am certain they are the same percentages.

Mr. Billings: I will object, then, your Honor, on the ground that these percentages are distorted as to the defendant Carnation Company in that they do not include all of the products manufactured and sold by the plaintiff, nor of the defendant Pet Milk Company; and, secondly, on the ground that in allocating—in this particular thing he is talking about private label sales, and the evidence is clear that defendant Carnation Company does not make private labels, nor does it make any such sales, so it would be highly improper to allocate anything for the Carnation Company with respect to private label sales.

The Court: I think all these objections go to the weight, rather than the admissibility of this exhibit. The objection is overruled. The exhibit is received.

(The document marked Plaintiff's Exhibit No. 100 for identification was received in evidence.)

Direct examination.

By Mr. Alioto (continued):

Q. I will show you next, Mr. Caldwell, second to last Plaintiff's Exhibit 101, which purports to be the details upon which Paragraph F of Exhibit 95 is predicated. Will

you be good enough to examine it, please, and then state concisely what it is?

[fol. 539] A. It indicates by year the number of dozens of Utah brand pies sold by the Utah Pie Company, the selling proceeds, based upon the range of prices from $4.30 to $3.70 per dozen, subtracting from that the actual net proceeds received and setting forth the additional revenue that Utah Pie Company would have received had their product been sold at this various range of prices.

Q. To the best of your knowledge, are the figures therein set forth accurate, and are the computations correct?

A. Yes, sir.

Mr. Alioto: We will offer it into evidence, if your Honor please.

Mr. Billings: Your Honor, may I ask the same voir dire question with respect to the allocation of this?

The Court: I think that question goes to the weight rather than the admissibility. I don't think it is a proper voir dire question.

Mr. Billings: I make the same objection to this number, which is 101, as to the other exhibits, with respect to the Carnation Company.

The Court: Yes, the objection is overruled. The exhibit is received in evidence.

(The document marked Plaintiff's Exhibit No. 101 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, Mr. Caldwell, bearing in mind Mr. Lamb's objection of a moment ago that the product mix from Dr. Anderson's study is not in evidence, I desire to accommodate Mr. Lamb. I show you Plaintiff's Exhibit 102 for identification. Would you be good enough to look at it please, and then state what it is?

A. This is a pie graph indicating the relative importance of various flavors of frozen fruit 8-inch pies. I also am certain that the product mix by flavor is set forth on the per dozen sales sheets also in evidence.

Mr. Lamb: Your Honor, I object again on the same basis, that this is fragmentary and it should have been put in as one single document.

[fol. 540] Mr. Alioto: It stands on its own, if your Honor please. It is the product mix he used in this study. We will offer it.

• • • • • • •

By Mr. Alioto:

Q. Documents that you placed in evidence the last time you were here?

A. No. This is on the Dr. Anderson and Dr. Lambourne's report, indicating the total dozens sold in the Intermountain area.

Q. Oh, yes. This is Exhibit 62. Is that one you're speaking of?

A. Yes, sir.

Mr. Alioto: Okay. We'll offer 102 in evidence, if Your Honor please.

The Court: Any objection?

Mr. Lamb: The same objection that I had here before, that it should go in as one document.

The Court: The objection is overruled. The exhibit is received.

(The exhibit marked Plaintiff's Exhibit No. 102 for identification was received in evidence.)

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[fol. 541] Mr. Lamb: If your Honor please, we were presented most of these tabulations during the course of the day, and they are indeed complicated.

The Court: As far as I'm concerned, there is no desire to push you into your examination of the witness until you have an opportunity to look at these things, and I'm prepared to recess any time you folks suggest.

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Cross examination.

By Mr. Schafer:

Q. Mr. Caldwell, I take it you don't offer yourself as a merchandising expert?

A. No, sir.

• • • • • • •

[fol. 542] By Mr. Schafer:

Q. I take it, Mr. Caldwell, in putting together Plaintiff's Exhibit 95, what you did was to take some assumptions, merchandising assumptions, offered you by somebody else and worked out some numbers on the basis of those assumptions, is that correct?

A. The merchandising assumptions which you refer to, Mr. Schafer, would have to be more specific, in order to answer that.

Q. Well, let's take this assumption: You list prices on Plaintiff's Exhibit 95 ranging from $4.30 to $3.70.

A. Those prices were supplied me by Mr. Alioto.

Q. One of the assumptions of this study, am I not correct, is that but for defendants the plaintiff would have been able to keep on selling his products at at least $3.70, is that correct?

A. It gives a range of prices—the schedules are based upon the pies having been sold at the range of prices set out.

Q. That's right.

A. Yes.

Q. And the lowest price is $3.70?

A. Yes, sir.

Q. And so the assumption is that but for defendants plaintiff would have been able to sell for at least $3.70?

A. That—

Mr. Alioto: If your Honor please, that is not an assumption, it is a study. That is something to be argued to the jury. The study is just a mathematical computation based on that.

Mr. Schafer: I am trying to get—all I want the witness to say is that the study is simply a mathematical computation.

The Court: What you want to get him to say, it sounds to me like, is that it is an assumption.

[fol. 543] Mr. Schafer: Excuse me, I didn't understand your Honor.

The Court: Assumption.

Mr. Alioto: I will stipulate that the figures with respect to 4.30 to 3.70 are simply doing the arithmetic for the jury, nothing else, mathematical computation.

By Mr. Schafer:

Q. So that you don't bring, Mr. Caldwell, to the study any expertise other than simply adding and subtracting the numbers, is that correct?

A. Will you explain the word which you used. You mean expert merchandising?

Q. That's right.

A. This is just a mathematical computation.

Q. That anybody operating on the same assumptions could have made the same computations?

A. Yes.

Q. Am I correct in understanding, Mr. Caldwell, that the way the study is put together, that, taking Category A, you have assumed, if you will, that throughout the three years that you are studying here that the plaintiff would have had 70 per cent of the market and I am talking now only of the advertised brand market.

A. The study is predicated on that base percentage in 1958, yes, sir.

Q. You took the plaintiff's percentage or share of the market in 1958 and assumed that would stay the same throughout the three years?

A. Yes, sir.

Q. And you assumed, furthermore, that the plaintiff would maintain a 100 per cent of what we call the private label business?

A. On the Bel Air brand. The Bel Air brand dozens are predicated upon the Bel Air brand dozens set forth in the market survey.

Q. I am talking about the plaintiff's private label, sir, that you have not computed in Category A the dozens that the plaintiff sold under a private label.

A. In arriving at that percentage?

Q. That's right.

A. No, sir.

Q. So that the 70 per cent, plus all the plaintiff's private label, is what you are suggesting plaintiff should have had when you computed Category A?

A. No, sir, I don't think that is correct.

Mr. Alioto: The witness isn't suggesting anything. That is assuming something not in evidence, if your Honor please. He has made a simple mathematical computation. There is no suggestion he should have had anything.

[fol. 544] Mr. Schafer: I submit that, your Honor.

The Court: I think that you are talking about a mathematical computation. This witness isn't suggesting anything, that anybody should get anything or should not get anything. He is an accountant, a CPA, who has made some computations on the basis of some figures.

Mr. Schafer: Maybe my verb is wrong.

By Mr. Schafer:

Q. The basis for Category A, if I understand it correctly, is that the plaintiff would have maintained a 70 per cent share of the advertised label business, plus he would have maintained all of his private label business.

A. The percentage is based upon the advertised label business, and the percentage is applied against only the advertised label dozens.

Q. And Morton's share of market— Am I correct, Mr. Caldwell, that Morton's share of market is figured on 1.4 per cent?

A. Morton's share of the market in 1958, which is the base year, was 1.4 per cent.

Q. And so that, in effect, the basis for the study is that anything that Morton grew beyond that is a measure of damages to plaintiff?

A. In relation to the defendant.

Q. That's what I mean.

A. In relation to the plaintiff, excuse me.

Q. That's right. If Morton changes its relationship that existed in 1958, which was 70 per cent versus 1.4 per cent, that any change in that relationship in Morton's favor is the measure of damages?

A. Any change in that relationship enters into the computation. However, that is not the measure of damages, Mr. Schafer.

Q. In respect of the Denver market, Mr. Caldwell, you have made some computations there, I take it, based upon projected volume, right, of the plaintiff?

A. Yes, sir.

Q. And again, that's on the basis of some information that was handed to you by somebody else?

A. It's based upon an exhibit, I think, that's in evidence.

Q. You don't know anything about the Denver market yourself?

A. I—I know, or have personal knowledge, of some of the volume of sales by certain of the defendants in the Denver market.

The Court: Well, it doesn't make any difference what he knows. The important thing is that that computation must be based upon the evidence and received here in the [fol. 545] record. These are computations made from exhibits and perhaps other evidence received in the record here; and his personal knowledge about anything isn't any more important than my personal knowledge about it, and I don't know anything about it, and maybe he doesn't know anything about it. It's unimportant, immaterial, hasn't any bearing on this lawsuit whatever, what he knows.

By Mr. Schafer:

Q. Are you aware, Mr. Caldwell, that the record in the case says that Morton's business in the Denver market was something like 70,000 dozens up to August 31, of 1961?

A. I have no knowledge of what's in the record in that regard.

Q. You have projected a volume, Mr. Caldwell, loss volume, of defendant of what figure—I'm sorry—plaintiff—for what figure of 1961 in the Denver market?

A. Which number is that, Mr. Schafer?

Q. Excuse me. It's Exhibit 94, sir.

A. It would be 105,000 dozens.

Q. Up to August 31 of '61?

A. Yes, sir.

Q. And if Morton's total volume that year up to that date was only 70,000, you will then have—you have then projected plaintiff's loss of sales of some 154 per cent of what Morton actually sells; is that correct?

A. This is not my projection, Mr. Schafer. It's based upon the exhibit that's in evidence.

Q. I understand that. But 105,000 dozen would be about 154 per cent of what Morton sells during that same period of time in that—

The Court: Well, that's your computation.

Mr. Alioto: If your Honor please, it's argumentative and has nothing to do with this witness.

The Court: Yes.

Mr. Schafer: I wonder if he can accept it. That's all.

The Court: The objection is sustained. Argumentative.

* * * * * * *

[fol. 546] By Mr. Schafer:

Q. Where your grand totals, Mr. Caldwell, read a total of A, B, C, and F, isn't it a fact that the grand totals include also E and G?

A. Yes, sir. In each instance. The only reason that the A, B, C, and F are set out separately here is because there's a range of price. In other words—

Q. I see.

A. —A, B, C, and F, based on the $4.30 price, plus—

Q. I see.

A. It's true in each of the other four totals.

Mr. Schafer: Can I have a minute to consult with co-defendants' counsel?

The Court: Surely. Go ahead.

By Mr. Schafer:

Q. Mr. Caldwell, if I may, turning to Plaintiff's Exhibit No. 96, do you have that before you?

A. What is the alphabetical number?

Q. It's A.

A. Yes, sir.

Q. The projections, as I understand it, of damages are based upon a 70.41 per cent market share in 1958; is that correct? Then an 11.72 per cent decrease in '59? Am I correct?

A. Yes, sir.

Q. And a 30.13 per cent decrease again in 1960?

A. Yes, sir.

Q. And a 36.77 per cent decrease in 1961?

A. Yes, sir.

Q. And you used as the basis for some of your compu-
[fol. 547] tations in underlying Plaintiff's Exhibit 95, you used Dr. Anderson's market studies; is that correct?

A. Yes, sir.

Q. Now, the actual volume of sales experienced by the plaintiff company in fact increased during those years; is that correct?

A. Considering the private label brands, Mr. Schafer?

Q. Yes—the plaintiff's business.

A. Yes, sir.

Q. In 1958 it was 37,969 dozens? Correct?

A. I don't have the market survey with me, Mr. Schafer.

(Mr. Schafer shows to the witness.)

A. Yes, sir.

Q. And then in 1959, it grew to 38,372; is that correct?

A. Yes, sir.

Q. And in 1960 it grew from 38,000 to 82,894?

A. Yes, sir.

Q. And then in 1961 it grew from 84,000 to 102,690; is that correct?

A. Yes, sir.

Q. It had just about tripled in the four years we're talking about, this total volume; is that correct?

The Witness: Well, the exhibit shows it, doesn't it?

Mr. Schafer: In fact, it does, your Honor.

The Court: Yes, well you don't need to ask the witness what the exhibit shows.

By Mr. Schafer:

Q. Mr. Caldwell, I am reminded that in Plaintiff's Exhibit 96, again, you took, as I understand it, for your percentage of the market, you took the Anderson study that we've talked about?

A. Yes, sir.

Q. And then you analyzed—if I'm incorrect, correct me—you analyzed that study and found that the Anderson study did not include all of the plaintiff's actual sales; is that correct?

A. Yes, sir.

Q. So that you took the plaintiff's actual sales as shown by a different study; is that correct?

A. We determined this and made very comprehensive studies, Mr. Schafer, that the Anderson report was predicated upon certain select areas where the defendants were in competition with the plaintiff or were operating in the same area. We determined from the I.B.M. runs which was furnished us by the defendants that that did not in- [fol. 548] clude all of the sales of either the plaintiff or the defendants in the entire trade area. Based upon this, we were certain that the Anderson report contemplated a rather thorough sampling, which is very common in de-

veloping statistics. We also realize, certainly, that if all of the sales, for example, in the so-called Salt Lake Division of Pet, which is the only company on which we have a geographical breakdown confined to the Salt Lake Division, that there would be substantially more dozens shown for at least the Pet Milk Company, and based upon that, that the percentages utilized from the Anderson report are very conservative.

Q. Well, see if I can understand that. Is it your testimony that you took a different trade area than the trade taken by the Anderson report?

A. No, sir. We based the percentages upon the Anderson report—

Q. Yes.

A. —which is a thorough sampling. However, that did not include all of the areas in which Utah Pie Company was doing business, nor in which the defendants were doing business, in areas that you could reasonably contemplate would be competitive.

Q. What do you mean "competitive?"

A. Competitive with the Utah Pie Company, that they could—

The Court: In competition with them.

The Witness: That they could economically serve from Salt Lake City.

By Mr. Schafer:

Q. What is the trade area, then, that is included in subcategory 3 in Plaintiff's Exhibit 96?

A. That is the total area served by Utah Pie Company.

Q. You mean that's all the Utah Pie Company sells?

A. Yes, sir.

Q. All of them?

A. Except the private label. Private label is not included.

Q. I understand that.

A. Yes, sir.

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[fol. 549] By Mr. Schafer:

Q. Can you recall, Mr. Caldwell, for us now, what states are included in the volume figure shown under Item 3 of 96?

A. It would be all states in which Utah Pie Company has done any business.

Q. Any non-private label business?

A. Non-private label business, yes, sir.

Q. Can you tell us what those states are?

A. It would be recalling from memory. I think it's Utah, Colorado, Idaho, perhaps Wyoming—

Q. If you don't know, there's no point in going through it, sir.

A. I think, Mr. Schafer, the I.B.M. run upon which the study is based is in evidence and clearly indicates those states.

Q. Yes. If I understand it correctly, Mr. Caldwell, in Plaintiff's Exhibit 96—well, the basis for the entire computation is that you excluded the "all other" category of sales and just figures the percentages of the four parties to this case; is that correct?

A. That is correct, sir, yes, sir.

[fol. 550] Q. What was the reason for eliminating the "all other" category?

A. First of all, it's not defined, and secondly, the objective was to present the relationship of the defendants to the plaintiff. The "all other" category becomes rather insignificant in the later years, in any event.

Mr. Schafer: Well, I move to strike that conclusion, your Honor. It's a conclusion of a competitive fact, which he's testified he has no confidence in.

The Witness: That was strictly, Mr. Schafer, on the number of dozens sold.

The Court: Overruled.

By Mr. Schafer:

Q. Just one more question, Mr. Caldwell, and then we'll be through. In Plaintiff's Exhibit 100, in that study you

computed the additional revenue on plaintiff's private label sales; is that correct?

A. Yes, sir.

Q. And in that study you make an allocation as between Pet and Continental and Carnation; is that correct?

A. Yes, sir.

Q. Are you aware that neither the Carnation Company nor the Continental Company have any private label sales in this market?

A. Yes, sir.

Q. Will you tell me, then, why it is that you allocated to them some of this alleged loss of revenue on the basis of private label sales?

A. Well, essentially, of course, this schedule contemplates showing a depressed price effect. In the documents of Pet Milk Company which did have private labels, it indicates that when a deal or a discount was made on their Pet-Ritz, that they allowed Safeway a certain percentage or a certain discount on the private label. Therefore, it follows that whatever price depression occurred in advertised brands would follow through to private label brands.

Q. Do you know whether or not in fact the plaintiff's selling price on private label was ever affected by any allowance or price decline offered by any of the three defendants?

A. In connection with the Safeway contract, yes, sir.

Q. I am afraid I don't understand that answer. Could you amplify it, please?

A. Well, I have seen some documents to the effect that announcement in certain zones in connection with the Bel Air said that a certain price discount would be allowed by virtue of price declines in the advertised brand.

[fol. 551] Q. Do you know whether or not any price decline ever offered by the Morton Company had any effect upon the selling price of the plaintiff's private label business?

A. That I cannot say.

Q. Do you know whether or not any decline or promotional allowance offered by the Carnation Company ever had any effect upon the selling price of the plaintiff's private label business?

A. I have an opinion, Mr. Schafer. However, I can't say for sure.

Q. I am not interested in your opinion.

A. Yes, sir.

Q. As a matter of fact, you don't know.

A. Yes, sir.

The Court: He told you he had an opinion, and you asked him for the opinion, and that's what you got.

Mr. Schafer: No, I didn't ask him for an opinion. I asked him for the facts.

The Court: He said he had an opinion. You said, "Give me your opinion."

Mr. Schafer: No, I didn't. I said I am not interested in his opinion. You must have misunderstood me, I am sorry. I said I didn't want his opinion because he is not, as I understand it, offered as an expert in merchandising.

The Court: He must have misunderstood you, too, because he gave it to you.

Mr. Schafer: That is all we have, your Honor.

Mr. Alioto: If your Honor please, to complete this case, I will just offer, without the necessity of reading to the jury at this time, first of all, the Salt Lake City invoices from 1958 to 1961 of the Continental Baking Company, that is, the Morton Frozen Food Division. I have agreed with Mr. Schafer—I believe this to be a complete set of invoices. However, subject to check, if it turns out that they are not, we will supply the rest of the invoices as part of that exhibit.

Mr. Schafer: I plan to offer today, your Honor, a full set of the invoices.

[fol. 552] The Court: Well, this is received.

(Plaintiff's Exhibit No. 103 was thereupon marked for identification and received in evidence.)

Mr. Alioto: Now, if your Honor please, I offer as against the Carnation Company only at this time a document dated October 31, 1957 which purports to set out certain regions for Simple Simon pie distribution. Offer it into evidence.

Mr. Billings: I will object on the ground that it is too remote in time, your Honor, October, 1957.

Mr. Alioto: Your Honor recalls that there was a letter from the Pet Company to a Miss Eunice Cox, dated October of 1957, in which certain Carnation zones for pricing purposes were copied by Pet. It is offered in connection with that.

The Court: It is received.

(Plaintiff's Exhibit No. 104 was thereupon marked for identification and received in evidence.)

Mr. Lamb: I object to that characterization. There is nothing in evidence saying we copied them.

Mr. Alioto: Well, the letter speaks for itself. It is a letter addressed to Miss Eunice Cox.

The Court: Received in evidence.

Mr. Lamb: Your Honor, is the characterization stricken?

The Court: If it is a characterization. I don't know whether it is or not. What does the letter say?

Mr. Alioto: I would be perfectly— The letter states that these are the Carnation prices and then they have exactly the same prices with two exceptions.

But, in any event, if there is any problem about it, this refers to the Eunice Cox letter, and I withdraw anything that might be regarded by my eminent friend as a characterization.

[fol. 553] Mr. Billings: That does not refer to the Eunice Cox letter, Mr. Alioto.

Mr. Alioto: I say the exhibit is offered. I am answering your objection and saying this exhibit is offered in connection with that Eunice Cox letter of the Pet Company.

The Court: The exhibit is received in evidence and has been for a couple of minutes.

Mr. Alioto: We will offer now, if your Honor please, a letter dated November 21, 1955, between a research organization and the—no, this one first, dated November 25, 1955, between a research organization and the Carnation Company.

Mr. Billings: I object on the ground that any communication of November, 1955 between Carnation and the Market Research Company is entirely irrelevant and immaterial to this action.

Mr. Schafer: I take it, your Honor, this is not being offered as against the Morton Company.

Mr. Alioto: At this moment it is being offered only against the Carnation Company, but there is a reference to the Morton Company in it, as I explained.

The Court: Received in evidence.

(Plaintiff's Exhibit No. 105 was thereupon marked for identification and received in evidence.)

Mr. Alioto: We offer next, if your Honor please, a document dated July 29, 1958, between the Carnation Company and the Market Research Corporation of America, the same organization that made the study for the Pet Company, which was offered in evidence.

The Court: Received.

(Plaintiff's Exhibit No. 106 was thereupon marked for identification and received in evidence.)

Mr. Schafer: This is not offered against Morton Company?

[fol. 554] Mr. Alioto: These are all being offered at this time against the Carnation Company.

We offer next, if your Honor please, a document dated January 29, 1958, an inter-office memorandum to Mr. R. F. Murphy, who testified in this case, from—and another employee of the Carnation Company. And this also is being offered at this time only against the Carnation Company.

The Court: Received.

(Plaintiff's Exhibit No. 107 was thereupon marked for identification and received in evidence.)

Mr. Billings: May the record note my objection to all of them on the ground they are irrelevant and immaterial.

The Court: Overruled.

Mr. Alioto: I offer finally, if your Honor please, as Exhibit 108 a document from the Market Research Director of the Carnation Company to Mr. Frank Graf of the A. C. Nielsen Company, a market research organization.

Mr. Billings: Objected to on the grounds the document in 1955 is irrelevant and immaterial to the issues in this action.

The Court: Overruled. Received.

(Plaintiff's Exhibit No. 108 was thereupon marked for identification and received in evidence.)

Mr. Alioto: If your Honor please, we ask for the opening of the deposition of Mr. Gordon Ellis of the Pet Company.

The Court: It may be published.

Mr. Alioto: Let me state for the record what it is we are offering. We are offering from that deposition that document which is marked Exhibit 6, that being certain invoices of the Pet Company. If your Honor please, we do not have those physically in the courtroom, I understand, and I have asked for their production from counsel for Pet, and before closing the case, I would simply say we want the right to reopen just to put those invoices, [fol. 555] which are marked Exhibit 6 in the Ellis deposition, into the record of this case. We will make arrangements to have them photostated and thereafter we will offer them into the record.

Mr. Lamb: There are 6,000 invoices involved, your Honor. They are in St. Louis, Missouri.

* * * * * * *

Mr. Alioto: We will make arrangements, if your Honor please, to have them photostated in the Pet Office and

make them available in this record. I just want to point out, your Honor, that they are Exhibit 6 in the Ellis deposition, and they are being offered in connection with the testimony identifying them as the records of the Pet Company. With that, if your Honor please, the plaintiff rests its case.

Excuse me. There was one other matter which has not been acted upon. There has been marked for identification and offered in evidence subject to an argument Plaintiff's Exhibit 61, which was a Market Research Report, that was received in evidence only as against the Pet Company. Then we offered the deposition of the Market Research Vice-President who made that report. That is before the Court. And on the basis of that deposition, which indicates clearly how that survey was made, we now offer that market survey as against the Carnation Company and as against the Morton Company.

[fol. 556] I call your Honor's attention to the authorities in the motion picture cases where theatre surveys are made on the basis of sampling and have been introduced into evidence in these cases from Bigelow down. One of them was introduced, as a matter of fact, in the Villa case before your Honor, and these surveys in recent years, and particularly in recent years, have been recognized by the courts as competent evidence when predicated upon a sampling which is deemed sufficient. We offer it therefore as against the Carnation Company and the Continental Baking Company, as well as against Pet, against whom it has already been received.

Mr. Schafer: I have the same objection, your Honor. This is complete hearsay and it is incompetent to prove anything about the issues in this lawsuit or the market that is involved in this lawsuit.

The deposition itself apparently says that the statistical study is worthless as pertaining to the Salt Lake City market. A good statistical survey, properly done, directed toward the right ends, clearly is admissible. There is no question about that.

The Court: Why do you always argue these objections?

Mr. Schafer: I'm sorry. I apologize.

Mr. Billings: I make the same objection now I made the other day, your Honor.

The Court: The objections are overruled. We will receive the exhibit.

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MOTIONS AND THE COURT'S RESERVATION ON RULING

Mr. Lamb: Your Honor, I would like the record to show that I move dismissal on behalf of Pet on the conspiracy charge, and that I move for severance on the Robinson-Patman charge.

Mr. Schafer: I would like the record to show, your Honor, that I move alternatively to dismiss or for a directed verdict on both the Section 1 charge and the Section 2 charge, and the section 2 (a) charge, all three charges; and on the 2 (a) charge, in the alternative, I move for severance at this time.

[fol. 557] Mr. Billings: Your Honor, I should like the record to show that on behalf of Carnation Company we move alternatively for dismissal or for directed verdict, first as to plaintiff's claim of conspiracy under Sections 1 and 2 of the Sherman Act, secondly, as to plaintiff's claim of separate and individual violation of Section 2 (a) of the Robinson-Patman Act, on two grounds: (1) that the plaintiff has failed to establish that defendant has discriminated in price as charged and, (2) that plaintiff has failed to produce evidence from which a jury could reasonably find that this defendant, or any discrimination of this defendant, has injured the business or property of the plaintiff, as required by the Clayton Act. Finally, we ask for severance on that last issue.

The Court: I am going to reserve a ruling on all of your motions until after the verdict. Call in the jury.

HERBERT JAMES ZIMMERMAN, called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schafer:

Q. Will you state your name, please, sir?
A. Herbert James Zimmerman.
Q. And your office address?
A. 605 Continental Bank Building.
Q. What is your profession, sir?
A. Certified Public Accountant.

Mr. Schafer: Would you mark this, sir.

(Defendant's Exhibit M-17 was thereupon marked for identification.)

By Mr. Schafer:

Q. I show you Defendant's Exhibit 17 for identification and ask you, without telling us what is on that document, could you tell us what it is?

A. It represents a chart comparing the prices of frozen pies in Salt Lake City, the apple flavor, as between the Carnation Company, Morton, Pet-Ritz brand, Pet Swiss Miss, Bel Air, the Utah brand pie of the Utah Pie Company, and the Frost 'N' Flame brand of the Utah Pie Company. The prices are stated per dozen.

[fol. 558] Q. What is the source of this data, sir?

A. There are individual sources as to each company. In the case of the Utah Pie Company, the original source are the invoices of that company. In the case of the three defendants the sources are the price sheets furnished us by those companies.

Q. And are those price sheets in evidence, to your knowledge?

A. It is my understanding they are.

The Court: He hasn't been here at any time during the trial. I don't know how he would know whether they were in evidence.

Mr. Schafer: I can state for the record they are, sir.

Mr. Alioto: All of them in evidence? Would you state that, Mr. Schafer?

Mr. Schafer: It is my understanding that all of them are.

By Mr. Schafer:

Q. Are you satisfied, Mr. Zimmerman, that this study accurately reflects the data shown on the price studies that you have worked up this chart from?

A. Yes, sir.

Mr. Schafer: I offer this in evidence, your Honor.

Mr. Alioto: May I have a voir dire on this, if your Honor please.

The Court: Yes.

Voir dire examination.

By Mr. Alioto:

Q. Did I understand you to say that for the Utah Pie Company you took invoices and for the three defendants you took their price lists instead of their invoices?

A. Yes, sir.

Q. Is that the way the study was made up?

A. Yes, sir.

Q. Who told you to do that?

A. I don't understand the question, sir.

Q. Who told you to do that, to take the invoices of Utah and just the price lists, the quoted price lists, of the defendants?

Mr. Schafer: Isn't this cross-examination, your Honor?

The Court: No, I don't think so.

[fol. 559] My Mr. Alioto:

Q. Who told you to do that?

A. I don't believe I was told to do that, sir.

Q. You mean you volunteered on your own to do that?

A. No, sir. I was furnished with the best documents that were available, and these were the best documents that were available to me.

Q. Didn't you have the invoices of the defendants when you made this selection of using the invoices of Utah, but the price lists of these three defendants? Didn't you have the invoices?

A. No, sir, we did not.

Q. Who ordered you to make this study?

A. We were requested by the three defendants, sir.

Q. And who paid you for the study, the three defendants?

A. Yes, sir.

Mr. Alioto: What I have to say from here on in, your Honor, I think would be cross-examination, and I will wait until that time to cross-examine on that kind of a selection.

Mr. Schafer: Defendants offer it.

The Court: Any objection? Are you through?

Mr. Schafer: I'd like, your Honor, it to be clear that the study reflects both the price lists and all the deals offered. It is not intended to reflect actual sales made.

Mr. Alioto: Just a minute. You didn't make this list. If you want to get some evidence, you ask him about it. Don't testify.

Mr. Schafer: I want to know what the purpose of—

The Court: You're contradicting your witness, Mr. Schafer.

Mr. Schafer: No, I'm not, your Honor. There's a misconception here, because I'm not.

The Court: Why don't you interrogate your witness?

Direct examination.

By Mr. Schafer (continued):

Q. Mr. Witness, what is the source material which you used to make that study?

[fol. 560] A. In the case of the defendants, we were provided with price lists and also what are known as deal lists. The deal lists effect an adjustment as to the basic price. We made various adjustments to the basic price lists from the deal lists. And on the work papers which we have in our possession. And from these work papers these charts were prepared.

Q. And on the basis of those work lists, you're satisfied the chart we're looking at accurately reflects the offering price of the various parties to this action during the year 1961 on apple pies?

A. Yes, sir.

Q. In the Salt Lake City market?

A. Yes, sir.

Mr. Schafer: The defendants offer the exhibit, your Honor.

Mr. Alioto: Just one other question on voir dire.

Voir dire examination.

By Mr. Alioto:

Q. Counsel has used a new phrase now. You've identified this as the offering price of the defendants; is that correct?

A. Yes, sir.

Q. But the actual price of the plaintiff?

A. Yes, sir.

Q. All right. In those instances where the defendants adjusted their price by making payments to the customer

on an independent check, would that be reflected in your price list?

A. To the extent that those payments were—that we were advised of those payments, yes, sir.

Q. Well, were you advised of them?

A. We requested that information, and we were presented with that information, sir.

Q. In what form?

A. In the form of written information, sir.

Q. Would you be good enough to show me the written document which shows the off the price list and of the deal list information?

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[fol. 561] The Court: All right. Go ahead.

By Mr. Alioto:

Q. Mr. Zimmerman, at the recess you were going to get for me the documents upon which anything off the face of the invoice—

A. Yes, sir.

Q. —in that sense was predicated. And you say it was supplied you by the defendants?

A. Yes.

Q. Do you have that?

A. I do.

Q. May I have that?

A. This is for Pet Milk, this is for Carnation Company, and this is for Morton (handing). These are the work papers, sir, that were used.

Q. Thank you.

A. This is for Utah Pie.

Mr. Alioto: Now, if your Honor please, any other questions we'd have would be rather, cross examination. Any objections we have go to the weight of the exhibit, rather than to the admissibility. So we have no objection to its introduction.

The Court: Received in evidence.

(The exhibit marked Morton's Exhibit No. M-17 for identification was received in evidence.)

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[fol. 565] By Mr. Schafer:

Q. Thank you, Mr. Zimmerman. And you testified that the source of material for the Carnation, Morton, Pet-Ritz, brands was the published list of prices?

A. That's—yes, sir.

Q. And your source for the Utah label and Frost 'N' Flame labels was what, sir?

A. The Utah Pie Company did not have a practice of having price lists, sir. So their source was their invoices. Now, I would like to mention that although the price lists that you refer to were part of the original source material for us, those were adjusted and reduced by all the various types of discounts in arriving at a net price. The prices reflected by this chart are those after subtracting all discounts, which include advertising discounts and what are known as off the face discounts and quantity discounts which were allowed from time to time by the various defendants off of the basic price list.

Q. And your chart is not intended to show the price at which something was actually sold, but rather what it was offered at?

A. You bet.

Q. Am I correct?

A. The offering price and the selling price, I'm sure, in many instances—or, the selling price and the offering price should be the same, but—

Mr. Alioto: If your Honor please, I make a motion to strike "The selling price and the offering price should be the same," because we have invoices to prove that isn't so; and this witness obviously is making a statement that he isn't qualified to make.

By Mr. Schafer:

Q. The purpose of your study as to the Carnation, Morton, and Pet-Ritz brands was to show the offering price, is that correct, sir?

A. Yes, sir.

Q. And am I correct in understanding your prior testimony that you didn't use an offering price of the plaintiff [fol. 566] company on the Utah brand and the Frost 'N' Flame brand, why?

A. Because there was no published list of the same type as offered to us by the defendants, and they did not have a published price list.

Q. Am I incorrect in understanding, sir, that you are the author of the I.B.M. run which has previously been introduced into evidence here?

A. Yes, sir.

Q. And can you tell us from that, sir, how often the plaintiff makes sales at the prices shown on your study?

A. The sales of frozen pies by the plaintiff were at very regular intervals. They were daily, and few days passed by without any sales.

Mr. Schafer: Could we mark this as the next exhibit in order, please?

(Defendant Morton's exhibit No. M-18 was thereupon marked for identification.)

By Mr. Schafer:

Q. I show you, Mr. Zimmerman, what has been marked Exhibit M-18 for identification. Could you say whether or not the sources and methods and purpose of this exhibit are the same as Morton's Exhibit 17 received in evidence?

A. They are the same.

Q. Would you tell us what the heading of this exhibit is?

A. This exhibit is identical in every way in context as to the exhibit presently on the stand, with the exception

that the prices reflected are those in the year 1960. The same brands and the same colors are used as to all of the defendants and the plaintiff.

Q. And did you say that it's again, the apple flavor?

A. Yes, it is.

Mr. Schafer: In the Salt Lake market. We offer this exhibit, your Honor.

Mr. Alioto: Just a few question on voir dire.

Voir dire examination.

By Mr. Alioto:

Q. This exhibit, too, am I clear on this, that you used the Utah Pie's invoices of actual sales on the one hand, and on the other hand you used the defendant's price lists and deal sheets? Is that correct?

[fol. 567] A. As mentioned to you, sir, we were not able to obtain a price list from Utah Pie Company, and, therefore, the only source of their prices were their invoices.

Q. Weren't you able to obtain the invoices from these defendants who hired you?

A. I was not—

Mr. Schafer: Excuse me. This is cross examination, your Honor.

Mr. Alioto: Well, I guess it is. I guess it is.

The Court: Yes, I think so.

Mr. Alioto: My objection is, if your Honor please, is that these would go to the weight, rather than the admissibility, so we'll wait until the cross examination to develop that fact.

The Court: Received in evidence.

(The exhibit marked Morton's Exhibit No. M-18 for identification was received in evidence.)

By Mr. Schafer:

Q. Now, Mr. Zimmerman, we'll show this exhibit to the jury; and perhaps you could just briefly trace out to the jury what showings were made.

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[fol. 568] (Defendant Morton's Exhibit No. M-19 was thereupon marked for identification.)

By Mr. Schafer:

Q. I should like to show you now, Mr. Zimmerman, Morton's Exhibit 19 for identification and ask you if you can tell us what that is.

A. This exhibit contains a number of charts, each one identified separately, and it shows the prices at which the defendants and the plaintiff sold their pies during various years. In the case of Salt Lake City, it also shows the brand—the years 1958, '59, '60, and '61.

Q. On what flavors?

A. On the flavors—the first flavor shown is apple. The next one is Salt Lake City, cherry, and the years covered are 1958, '59, '60, and '61. And Denver, the apple, we have the years 1959, '60, and '61.

Q. Now, on Denver, sir, would you identify what brands are shown on the Denver study?

A. Yes, sir. Now, in the case of Salt Lake City, apple and cherry, the Utah Pie brands; namely, Utah Pie and Frost 'N' Flame, are shown, whereas in the Denver, Utah Pie's brands are not listed on that chart. And this is a comparison between the Carnation brand, the Morton brand, and the Pet-Ritz three brands, namely, the Pet-Ritz, the Swiss Miss, and the Bel Air.

[fol. 569] Q. Then, would you go through and identify—what else is in this exhibit?

A. Then, again, we have Denver, the same years, and the same brands, excluding Utah Pie, and the cherry flavor. At this point we have Spokane, 1959, '60 and '61, the same

brands, excluding Utah Pie Company's brands. And the flavor is apple.

We again have Spokane, with a flavor, cherry.

Q. Same years, 1959, '60 and '61?

A. Yes, sir. Then we have southern California. The flavor is apple, and the brands are the same ones, not including Utah Pie Company.

Q. And the years are '59—

A. —'60 and '61.

We have the same with southern California, again, the flavor being cherry.

These charts represent northern California. The flavor is apple, and it's the same brands, excluding Utah Pie Company.

This is northern California, and the flavor is cherry, and the same brands, again, excluding Utah Pie Company. The years, again, are 1959, '60, and '61.

Q. Were the charts included, Mr. Zimmerman, in Morton's 19 for identification, developed from the same data as were the charts Morton's Exhibits 17 and 18?

A. Yes, sir.

Q. Are you satisfied that the charts in Morton's Exhibit 19 are correct?

Mr. Schafer: I offer them in evidence, your Honor.

Mr. Alioto: Just one thing on voir dire.

Voir dire examination.

By Mr. Alioto:

Q. I think you testified about four or five questions back that these charts showed the prices at which the plaintiff's and the defendants' sold their pies. Is that correct?

A. I believe it was made clear, sir, that it's the price at which the defendants offered their pies.

Q. Offered their pies. And in the case of the plaintiff, it's the price at which he sold the pies; is that it?

[fol. 570] A. Offered and sold, sir.

Q. Well, you got the plaintiff's from invoices only, didn't you?

A. Yes, sir.

Q. All right. And the defendants, you got from price lists, not invoices?

A. Yes, sir.

Mr. Alioto: On that understanding, if your Honor please, our objection goes to the weight, rather than the admissibility. We have no objection.

The Court: Received.

(The exhibit marked Morton's Exhibit No. M-19 for identification was received in evidence.)

Mr. Schafer: At this time, your Honor, I'd like to select out a few of these charts and show them to the jury, without going through the whole thing, and we will make the whole thing available to the jury later on.

By Mr. Schafer:

Q. I'm going to show you now a chart, Mr. Zimmerman; would you identify that for us, please?

A. This represents the flavor of apple in southern California in the year 1961; and shown on there in the same colors as is listed in this exhibit are the brands Carnation, Morton, Pet-Ritz, Pet Swiss Miss, and Bel Air.

Mr. Schafer: Let me just show this briefly to the jury, without reading all the names. Just to show the jury the pattern of pricing that's shown by this exhibit. This, of course, is the Morton line here. And here is the Pet-Ritz line. And, mind you, this is in the Los Angeles market. The Pet-Ritz line goes like that. There. And the Carnation goes down in stages like that. Basically right across. And this is the Bel Air line. And this is the Swiss Miss Line.

I'd like to just show the jury the same data in the Los Angeles market for 1960. And, again, you'll see the pattern of the prices, of the offering prices, of these five brands.

I will pick, again, the apple flavor in the San Francisco market and show the jury the pattern of the pricing there, and again the same five brands are shown, and the same pattern of pricing.

[fol. 571] And 1961. This is a picture of the offering prices on apple of the five brands identified in the San Francisco market.

Briefly again, this is the Denver market in 1960, apple pie offering prices of the five brands in the Denver market.

And in 1961, same market, same flavors, and same brands. That would be the picture of the offering prices of those five brands.

Mr. Alioto: Excuse me. What are the five brands in the Denver market?

Mr. Schafer: Carnation, Morton, Pet-Ritz—I'm sorry, six brands—no, five, Swiss Miss, and Bel Air.

Mr. Alioto: Not Utah Pie?

Mr. Schafer: No. The witness testified only the brands of the defendant companies in the Denver market.

I have no further questions, your Honor.

Cross examination.

By Mr. Alioto:

* * * * * * *

Q. Incidentally, Mr. Zimmerman, you had available to you, did you not, all of the invoices, Salt Lake invoices, of the Morton Company?

A. I saw them about a week ago.

Q. Now, just let me show you some of these invoices. Here is one, Plaintiff's Exhibit 14 in evidence in this case. Would you be good enough to look at that invoice, please.

A. Yes, sir.

Q. Have you seen it? Now, then, let's look over at your chart here for just a second. You will note that, in appearance at least, this chart, which is M-17 in evidence—

[fol. 572] we follow the green line, which is Morton. In appearance at least this chart shows that the lowest Morton price is $2.80, is that correct, so far as your chart is concerned? Right down here (indicating).

A. Yes, sir.

Q. That looks like the lowest price on your chart is $2.80. Now, what price does this Morton invoice that you had in your hands a week ago show? Look at it.

A. It shows a price, net price, of $2.55.

Q. $2.55. So, if we drew the green line down— What month is that?

A. This is in July of 1961.

Q. Right here (indicating). So if we drew your July green line down to $2.55 to correspond with that invoice, it would be down here (indicating), wouldn't it? I am pointing about three inches below your chart.

A. May I explain.

Q. Would you be good enough to say whether that is true or false.

A. I'm not sure it would go quite that far.

Q. But it would be below your chart, it would be off your chart, wouldn't it?

A. It would be below that black line there by 15 cents.

Q. If you measure 15 cents upward, you will see it is almost off the chart. But, in any event—

A. Almost.

Q. But in any event, since you had this invoice and since you were using the Utah invoices, why didn't you make your chart on that basis, which would be directly comparable?

A. We considered this problem, Mr. Alioto.

Q. Who considered it?

A. I did.

Q. Yes.

A. And this chart is intended also to reflect a comparable quantity price with each of the defendants. Now, in that particular case the invoice that you have just shown there,

that was—appears to have been at the full truck, or lowest price.

Q. Yes.

A. The prices listed here are not. For Carnation and for Utah Pie Company and for all of the other defendants, are not the full truck prices. In order to make this price chart comparable as to all of the defendants and the plaintiff, it was necessary to adjust the prices of Morton in the case—in that particular instance, from the full truck price to the quantity up to 700 cases.

Q. And is that why you didn't use the Morton invoices which you had available to you? Is that why?

A. No, sir.

Q. Somebody told you not to use the Morton invoices in comparison with the Utah Pie invoices, isn't that a fact, Mr. Zimmerman?

A. No, sir.

Q. Who made that decision not to use the Morton invoices against the Utah, when you had both of them? Who made that decision?

A. Mr. Alioto, we were supplied with the Morton invoices only a week ago, and these charts were not available at that time.

[fol. 573] Q. Was Morton your client?

A. Yes, sir.

Q. In this action?

A. Yes.

Q. And I take it they were open with you and gave you anything you wanted from them?

A. Yes, sir.

Q. You did have the Utah invoices from us, didn't you?

A. Yes, sir.

Q. And you have the power, presumably, to ask Morton for their invoices?

A. We were furnished with what we considered to be sufficient accounting information, sir.

Q. In any event, a week ago—was it exactly a week ago from today that you received the Morton invoices?

A. Approximately a week ago.

Q. Did you make a study at any time comparing the actual Utah invoices with Morton invoices instead of comparing invoices to price offerings.

A. Approximately a week ago we examined the Morton invoices.

Q. And did you make a study of them?

A. Yes.

Q. Where is that study?

A. It is in the hands of the Morton people.

Q. Is it in this courtroom?

A. I wouldn't know, sir.

Q. Would you inquire and get it for me if it is?

Mr. Schafer: I will have to say, your Honor, I don't even know what he is talking about.

Mr. Alioto: All right, let's find out what he is talking about.

By Mr. Alioto:

Q. You say you did make an invoice study of the Morton Company, is that right?

A. A limited study, yes, sir.

Q. Limited or otherwise, you did make a study. Would you please be good enough to describe it well enough so that Mr. Schafer will understand what it is.

* * * * * * *

[fol. 574] Mr. Alioto: No. I will just get this phase of it so he can bring back this study over the lunch hour.

The Court: What I am talking about is: Mr. Zimmerman, get that study in here when you come back at two o'clock.

The Witness: Yes, sir.

The Court: Bring it with you.

The Witness: Yes, your Honor.

By Mr. Alioto:

Q. Now, then, one other thing, Mr. Zimmerman. When you show these wide variations in prices in a very short period of time—let's just take one of them. Let's take Morton, since they presented this exhibit. Here is a green line which, in July, jumps from approximately 2.80—not an invoice, now, just a price offering—from 2.80 up to $4.00. Do you see that line, that jump?

A. Yes, sir.

Q. Now, you did have July invoices with you, didn't you?

A. Not at the time we prepared the chart, sir.

Q. No, but I mean you did have them before you came here?

A. Recently, yes, sir.

Q. I mean July invoices specifically. Isn't it a fact that this violent jump from 2.80 up to $4.00 results from the fact that a deal was in effect for a specific period of time, that all of the customers bought at that deal, and then at the termination of the deal you drew your line to show the price before the deal; that is correct, is it not?

A. It could be. You have my papers, Mr. Alioto, so that I would have to refer to them to see if this was the case.

Q. Let's take the Safeway sale, for example, because we have had some evidence here. You are aware of that 15,000-case Safeway sale that was made by Morton in July—in June and July of 1961, aren't you?

A. Not specifically.

[fol. 575] Q. Well, you saw the invoice on it, didn't you?

A. I have seen the invoices, but I do not recall them individually.

Q. Actually Safeway bought all of the 15,000 at the low leg of the price and none at the top leg of the price, isn't that correct?

Mr. Schafer: Your Honor, he has testified he doesn't know, and now he is being asked to guess.

The Court: Overruled.

By Mr. Alioto:

Q. Do you know?

A. I do not know, sir. I do not recall the invoice.

Q. Wouldn't you recognize, Mr. Zimmerman, from the standpoint of common prudence, if nothing else, that when you compare a price offering with prices at which a commodity actually sold, that the price offering would involve heavy buying at the low level and then, when everybody is stocked up, the price would go up again?

Mr. Schafer: Your Honor, I submit this is purely argumentative.

The Court: Overruled.

A. The chart would indicate—I would think that the purchases would be greater at a lower price than they would at a higher price.

By Mr. Alioto:

Q. So that if you just made your study on price purchases for Carnation, Morton, Pet, Pet Swiss Miss, Bel Air, price purchases, as against price offerings, obviously you would have a different picture entirely from what you have there, wouldn't you?

A. I would not think so, sir.

Q. You wouldn't think so. In the case of Safeway, for example, do you think you are going to find that 15,000 cases at a high price or a low price?

A. Well, you have made the statement that that is the Safeway invoice, sir, so if that is the Safeway invoice, it must be that line you have already indicated.

Q. Now, then, what consideration, Mr. Zimmerman, did you give—what consideration did you give to this study on floor stock protection, if any?

A. I do not recall specifically that particular type of discount.

Q. So that if there was a floor stock protection which was offered by any of these companies to any of the customers, it is not reflected on your chart, is that correct?

A. No, sir.

[fol. 576] Q. Mr. Zimmerman, at the recess you told us about an invoice price study you made of the Morton Company that you were going to look for over the noon hour.

A. Mr. Alioto, I am sorry if there was a misunderstanding. I understood your question to say: Did you make a study of the Morton invoices? And we did make a study of the Morton invoices, but not of the prices. And I have brought with me the study that I had reference to.

Q. Well, then, when you said this morning that you made a study of the Morton invoices in relation to prices, you were mistaken in that, were you?

Mr. Schafer: Your Honor, I don't think he said that.

The Court: That's what they were talking about.

Mr. Schafer: That is why we were all confused about it.

The Court: I don't know why anybody would be confused about that. They were talking about prices.

The Witness: We were talking about prices, but I heard Mr. Alioto—the words I heard were to the effect: Did you study the Morton invoices? And I did study them for the purposes of volume, not for the purposes, however, of price.

By Mr. Alioto:

Q. Now, is it your testimony now that, although you had the Morton invoices, you did not make a comparison at any point between the Morton invoices on the one hand and the Utah Pie invoices on the other hand?

A. Mr. Alioto, although it is true that a comparison could have been made, in my opinion, such a comparison would have no direct bearing on the preparation of these charts. These charts are intended to indicate what a person would have had to pay for a particular pie if he had wanted to buy, say, a Morton pie on a particular day. Therefore, the invoices as to what they were actually sold

at would not necessarily reflect the line on the chart if no sale had been made on that particular day.

Q. Mr. Zimmerman, what I am trying to ascertain now is this: Is it now your testimony that you never did make at any time a study which sought to compare the Morton invoices which you had with the Utah Pie invoices which you have put on that chart?

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[fol. 577] By Mr. Alioto:

Q. Is it now your testimony that you never did make a price comparison between the Morton invoices, which you had, and the Utah Pie invoices, which you have placed upon the chart?

A. Well, sir, the Utah Pie invoices represent one line by themselves in the case of Utah brand and the Frost 'N' Flame brand. The Morton prices are a separate line. And as far as comparing Utah Pie invoices with Morton invoices, I do not see, sir, how that would have accomplished anything.

Q. Regardless of what you see, my question is simply, Mr. Zimmerman, whether or not you ever did it.

A. Sir, we did not make a price study of the Morton invoices.

Q. Then you did not make a price comparison between the Morton invoices on the one hand and the Utah Pie Company invoices which you have on the chart on the other hand, is that your testimony?

A. My testimony, sir, is that we compared the Morton prices based upon their price list with the Utah Pie prices.

Q. I know that's what you did on that chart, but the question I am asking—and I will ask it once more, sir; perhaps I am not making myself clear—is: Have you ever, regardless of this chart, have you ever made a price comparison between the prices on the Morton invoices, which you had, and the prices on the Utah Pie Company invoices, which you had?

A. No, sir, I did not make a price comparison from the invoices of the Morton Company.

Q. What is the nature of the invoice study of Morton that you did make?

A. The study indicates the number of cases sold by Morton during the months, individual months, between 1958 and 1961 and the categories of volume in which they were sold.

Q. Is this the study that you have before you (showing)?

A. Yes, sir.

Mr. Alioto: May we have it marked for identification, if your Honor please?

(Plaintiff's Exhibit No. 110 was thereupon marked for identification.)

[fol. 578] By Mr. Alioto:

Q. This document which has been marked for identification Plaintiff's Exhibit No. 110, Mr. Zimmerman, does this purport to be a complete study of the Morton invoices for the period 1958 to December of 1961?

A. Yes, sir.

Mr. Alioto: We'll offer this in evidence, if your Honor please.

Mr. Schafer: No objection, subject to check for accuracy.

The Court: Received.

(The exhibit marked Plaintiff's Exhibit No. 110 for identification was received in evidence.)

By Mr. Alioto:

Q. Now, I want you, Mr. Zimmerman, to look at your exhibit which has been marked M-18, your 1960 chart.

A. Yes, sir.

Q. Would you be good enough to designate the Utah Pie line for us, please?

A. It's this brown line.

Q. It's this brown line here?

A. Yes.

Q. Now, this brown line dips in three places in March of 1960, in April of 1960, and in July of 1960. Is that correct?

A. Yes, sir.

Q. Otherwise, it maintains a fairly even keel. Did you check those invoices to be sure you were correct about that?

A. We listed on work sheets, all of the invoices of the Utah Pie Company. After we had completed this phase of the work and after we had gone ahead with the work to a certain point, it became apparent to us that these dips looked artificial. In other words, it's quite obvious that the price of the Utah Pie and the Frost 'N' Flame pie at this point are identical. And the question, therefore, arose in our minds as to whether or not we could have had the wrong identification on an invoice. The Utah Pie Company invoice has two little boxes, and they check the box depending on whether it's the Utah Pie brand or the Frost 'N' Flame.

Q. Isn't it possible that you made a mistake in reading those invoices?

A. Sir, we could have made a mistake. And at this point we made a request of the Utah Pie Company for permission to reexamine their books. This was about two months ago. And at that time we were denied access to the books. We wrote a letter advising the respective attorneys of the refusal to allow us to reexamine the books to check the accuracy of our work. It was decided that these deviations of themselves were not sufficiently material to make a substantial issue of that—of the refusal.

[fol. 579] Q. Let's just check it. You see, for example, in Plaintiff's Exhibit 4—did you prepare this, incidentally? This is the study of the Utah Pie invoices.

A. Yes, sir.

Q. You personally prepared that. Now, you notice Invoice No. 335?

A. Yes, sir.

Q. For what pie do you have that?

A. Beg your pardon, sir?

Q. For what pie is it? A Utah pie or Frost 'N' Flame?

A. It's the Utah pie.

Q. Utah pie. And that 335, you notice, is on April 28?

A. Yes, sir.

Q. Of 1960. Now, that looks like this dip right here on Plaintiff's Exhibit 18, the April dip, doesn't it, for the Utah Pie?

A. Yes, sir, it does.

Q. Now, let's turn to invoice No. 335. I'm showing you now invoice No. 335 of the Utah Pie Company. Is that correct?

A. That's right.

Q. And you have this listed here for the Utah pie. Would you look at the invoice now?

A. It says Frost 'N' Flame.

Q. You'll agree with me that it's Frost 'N' Flame and that the chart, therefore, is in error in showing this dip in April?

A. Yes, sir.

Q. Okay. Now then, I understand, Mr. Zimmerman, that in this kind of a complex study that these little errors can be made. So we're not suggesting that there's anything wrong about these things.

A. Yes, sir.

Q. Now, let me show you 456, invoice 456. You have that for the Utah Pie; is that correct?

A. That's correct.

Q. And that's the July dip, isn't it, July 27?

A. Yes, sir.

Q. And that invoice number is 456?

A. Uh huh.

Q. Now, by turning to invoice No. 456, will you agree with me that that's really Frost 'N' Flame, and not the Utah Pie at all?

A. Yes, sir.

Q. And, therefore, that July dip should be eliminated for that reason?

A. Yes, sir.

Q. Just one last thing. Did I understand you to say that the first time you had access to anybody's invoices from the defendants was just a week ago?

A. That's correct.

Q. Didn't you help Dr. Anderson prepare that study of his?

A. No, sir.

Q. Didn't you supply Dr. Anderson with the figures from the invoices of the Utah Pie Company to begin with?

A. No, sir.

Q. Did you make any examination at all of the Utah Wholesalers in connection with making an I.B.M. study of their invoices?

A. No, sir, we did not.

[fol. 580] Q. Do you know who did that?

A. No, sir.

Q. Now, just one last thing—I said that before, didn't I? It will be the last thing this time, Mr. Zimmerman.

A. Could I mention something, Mr. Alioto?

Q. You can make any statement you want, as far as I'm concerned, Mr. Zimmerman, if the Court wants to—

A. Just for the record, in reviewing the testimony I made this morning, I made the statement to the effect that we had used, or plotted a higher price than full truck price for Morton in 1960. Now, we actually in the case of Salt Lake City not too long ago readjusted our prices back from what's called the ex-warehouse price, which is close to 25 cents higher than the full truck price, back down to full truck price, at the request of the attorneys of Morton Company, who desired that their prices be shown—

Q. Don't tell us what the attorneys of Morton desire. Just state the facts.

A. Who requested us to do so, because that was the lowest possible price, so they stated to me. Now, the particular point that you referred to was actually caused by

what's called a pickup allowance, which is offered not only by Morton Company, but by other frozen pie companies as well. This offer of 30 cents a dozen is made for the purpose of inducing a customer to bring from California to the local market the pies. This offer is listed as a footnote on this statement (indicating) and is the reason why the invoice price in the example that you chose was actually lower than the price as reflected by the chart. I might mention that Utah Pie Company makes a similar type of offer in certain instances to customers outside of Salt Lake City, and these have also not been used to reduce the price or affect the price.

Q. You said that you weren't looking at the Morton invoices? That's a fact, isn't it?

A. I did not look at the—

Q. In connection with this chart?

A. That's right.

Q. Now, the Morton invoices, as a matter of fact, when you did look at them showed that that $2.55 had a prepaid sign on the left-hand corner of it, didn't they?

A. I'm sorry, I didn't examine them for price.

Q. All right. So if it had a prepaid price, it would mean that $2.55 here, wouldn't it? And there wouldn't be any 30 cents allowance involved; isn't that correct?

A. I don't—I don't know that it is or is not correct.

Mr. Alioto: Okay. One last thing. We'll just ask that these documents be marked for identification, they being the underlying documents—just for identification, we don't ask that they go in evidence at this time—the underlying documents supplied this morning to me by Mr. Zimmerman.

[fol. 581] (Plaintiff's Exhibits No. 111 and 114 were thereupon marked for identification.)

By Mr. Alioto:

Q. Incidentally, with respect to the Morton price list, such as you have set them out in these charts, you didn't actually examine the original price lists, did you?

A. No, sir.

Q. You simply took a summary that the lawyers sent you?

A. The one that I believe you have in your hand.

Q. Yes. 111. So that you have never examined the original Morton price lists or deal sheets in connection with the making of this chart?

A. No, sir.

• • • • • • •

Q. Now, referring, Mr. Zimmerman, to the price drop on Utah label in March of 1960—and I am referring you to Invoice No. 334 of this group of invoices of the Utah Pie Company—could you tell us what that shows as a price, net price, for the Utah label product?

• • • • • • •

Mr. Alioto: I think that will take care of it. I don't think it is clear in the record. It is stipulated then, that the three price drops on M-18 for the Utah Pie in March down to a $3.00 level, in April to a $3.00 level, and at the end of July to a $3.00 level—it is stipulated those ought to be eliminated and the line should be straight.

[fol. 582] By Mr. Schafer:

Q. Is that your understanding, Mr. Zimmerman?

A. Yes.

Mr. Schafer: Okay. I so stipulate.

Mr. Alioto: Thank you.

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Voir dire examination.

By Mr. Alioto:

Q. Just so we can be clear on this—and I promise not to ruffle this pretty art work, Mr. Zimmerman—just so we can be clear on this, M-20 also represents price offerings, or your study of price lists, or material supplied you by the

attorneys, rather than an actual study of the invoice, is that correct?

A. Yes, sir.

Q. And the invoices were available to you, weren't they?

A. I would like to say, Mr. Alioto, that although they were available, in our opinion that they would not have had any bearing on these charts. These charts are intended to show what they were offered at.

Q. The question is: But it is clear, is it not, that the invoices were, in fact, available to you?

A. Yes, sir.

Mr. Alioto: Under that background, if Your Honor please, we have no objection. Our objections go to the weight again.

The Court: Received.

THOMAS EDWARD HEREFORD, called as a witness on behalf of the Defendant Morton, being first duly sworn, was examined and testified as follows:

* * * * * * * *

Voir dire examination.

By Mr. Alioto:

Q. This chart—the title of the chart is "Comparison of Plaintiff's Sales with Sales by Morton, Utah-Idaho Trading Area."

What territory is encompassed within the Utah-Idaho trading area?

A. Utah—

Q. Does it, for example, include Colorado?

A. No, sir, it does not.

Q. It does not. Does it include Seattle, Washington?

A. No, sir.

[fol. 583] Q. Does it include Wyoming?

A. No, sir.

Q. Does it include Spokane, Washington?

A. No, sir.

Q. In other words, what you have done: You have just isolated the sales in the State of Utah, is that it?

A. Utah and Idaho.

Mr. Schafer: This is argumentative.

The Court: I don't think it is argumentative. He is trying to find out what he did.

By Mr. Alioto:

Q. It is just Utah and Idaho?

A. Yes, sir.

Q. And who asked you to isolate just those sales out, instead of taking the entire Intermountain territory? Who asked you to do that?

A. No one.

Q. You did it on your own?

A. Yes, sir.

Mr. Alioto: We have no further questions, and we have no objection.

The Court: Received.

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Voir dire examination.

By Mr. Alioto:

Q. Isn't it a fact that Morton doesn't keep cost records isolated to frozen fruit pies?

A. No, sir.

Q. You mean you do have such records?

A. We have regularly quarterly cost reports on all our products, yes, sir.

Q. On frozen fruit pies specifically?

A. Yes, sir.

Q. You mean that you do have records from which you can determine profits and losses on a quarterly basis?

A. We prepare quarterly profit and loss statements, which were supplied, I believe, to you, sir.

Q. On frozen fruit pies?

A. No. We do not prepare them on just frozen fruit pies this way, no.

Q. What have you prepared them on?

A. On all products.

Q. Well, how do you isolate your costs down to frozen fruit pies from these other records then?

A. We have the costs on all our products.

Q. And you have the sales prices?

A. Yes, sir.

Q. Therefore you do have records from which we can secure a profit and loss statement on your pies for the Salt Lake area?

A. No, sir.

[fol. 584] Q. I am a little confused now. Where are the records from which you prepared these things? Where are they?

A. I am not sure right at the moment. I presume we have some of them in the courtroom here, copies of them.

Mr. Alioto: May I see them, if your Honor please?

Mr. Schafer: They are in evidence, your Honor. No problem about that. Morton's Exhibit 1 in evidence and Morton's Exhibit—I don't know what the number is—Morton's Exhibit 2, in evidence.

Mr. Alioto: Let me see Morton's Exhibit 1.

By Mr. Alioto:

Q. Is this what you are referring to, Mr. Hereford, when you say you have quarterly cost records?

A. Yes, sir. These are costs of production.

Q. Let me put this example to you, so we can get this matter of these cost records cleared up. If it were true—assuming for the moment that you sold a pie for $2.55 in Salt Lake City in June or July of 1961, if that were true,

would you have records from which it could be determined whether or not that pie was sold at a profit or a loss?

A. We could make an approximation, yes, sir.

Q. And what is the nature of the records you have from which you could make that approximation?

A. Well, we have our costs here, which gives us our gross profit.

Q. Yes.

A. We know what our transportation cost is.

Q. Yes.

A. We have percentage figures that show what our brokerage commission is, for instance.

Q. Yes.

A. We know, when we had cooperative advertising allowance, what that was.

Q. Yes.

A. By applying all of these various factors we can arrive down at a net profit figure. We do not do this on an area-by-area basis.

Q. Well, this cost, this average cost, of Morton pies laid down in Salt Lake City, of course, is a cost on an area basis, isn't it?

A. Yes.

Q. Are all of the records from which you computed this Plaintiff's Exhibit 1, or this document you have in front of you now?

A. We have added to that the cost of transportation.

Q. And what is that?

A. I believe the documents for that are also placed in evidence, sir. That is our transportation—our cost, the cost of operating our truck fleet, broken down on the basis of how many pies we can load on a truck coming out to Salt Lake City.

[fol. 585] Q. And you transport your pies from Watsonville to Salt Lake City on your own truck?

A. No, sir. That would be from Webster City to Salt Lake City. When they came from Watsonville, we used the common carrier freight rate.

Q. Have you used the common carrier freight rate here on these exhibits you prepared?

A. Where it was applicable, yes.

• • • • • • •

By Mr. Schafer:

Q. Now, Mr. Hereford, I show you Morton's Exhibit 25 for identification and ask if you can describe to us what that is.

A. This is a summary of the profit and loss on sales by Morton in the Utah-Idaho area for the years 1958 through 1961.

Q. Can you tell us, sir, in your summary of profit and loss, what has gone into that computation?

A. We have taken the net selling price of the pie. From this we have deducted the cost to doors of the product, which is the total cost of operating production plant allocated on a product basis, the cost of Morton representative at our Watsonville operation, where that applies, the freight to the customer or the warehouse, where a warehouse is involved, the warehousing expense, where the sale was made from the warehouse rather than on a direct basis, the cooperative advertising allowances per our cooperative advertising contracts for the years when such were in effect, and our brokerage expense, which is paid on the basis of three per cent of our net sales.

Q. Now, I ask you to identify for us Morton's Exhibit 26 for identification.

A. This is the supporting—or, these are the supporting documents from which this summary was made. This gives the detail breakdown on arriving at the final figures.

Q. The final figures are on Morton's Exhibit 25?

A. On Morton's Exhibit 25, that's correct.

Q. Are you satisfied these are correct?

A. Yes, sir.

Mr. Schafer: I offer these in evidence, your Honor.

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Mr. Alioto: Here again, you used the expression "Utah-Idaho area." To what area do you refer?

[fol. 586] The Witness: Well, any sales made in Utah and Idaho. Nowhere else.

Mr. Alioto: Okay. We have no objection, if your Honor please.

The Court: Received.

(The exhibits marked Morton's Exhibits M-25 and M-26 for identification were received in evidence.)

By Mr. Schafer:

Q. I show you Morton's Exhibit 25, Mr. Hereford, and ask you whether or not that shows that in each of the four years involved, 1958 and 1959 and 1960 and 1961, Morton has made a profit in the Utah-Idaho trading area?

A. Yes, sir, it does.

By Mr. Schafer:

Q. Mr. Hereford, I show you Morton's Exhibit 27 for identification and ask if you can describe to me what that document is.

A. This is a computation of the profit or loss per dozen on Morton's sales during the year 1961. This is based on a document we were supplied which was prepared by the plaintiff, and we re-worked the figures.

Q. What do you mean, sir, that it was based on a document?

A. Well, we were given a document prepared by the plaintiff showing the profit or loss made by Morton on the sales. We disagreed with the basis on which this document was prepared. And so, taking his figures, we re-worked it on what we considered to be the correct basis.

Q. Did the study upon which you worked show the actual profit or loss, or a projected profit or loss?

A. It showed a projected profit or loss. It was not actual.

Q. And would you identify for the record Morton's Exhibit 28 for identification?

A. This is a recapping of Morton's sales by dozens for the years 1958, '59, '60, and '61, done to get the proper product mix. In other words, how much, what percentage was apple, what percentage was cherry, boysenberry, and so on, of Morton sales for those years.

Mr. Schafer: Your Honor, without waiving my previous objection to the admissibility to the document on which Morton's Exhibits 27 and 28 were based, I offer these documents in evidence.

Mr. Alioto: No objection, if your Honor please.

The Court: Received.

[fol. 587] (The exhibits marked Morton's Exhibits No. M-27 and M-28 for identification were received in evidence.)

By Mr. Schafer:

Q. Would you just describe for us, please, Mr. Hereford, referring to Morton's Exhibit 27, without talking numbers, what differences there were, if you will, in approach?

A. Well, on the original document prepared by the plaintiff, the Carnation weighted average of product mix had been used on the Morton sales. It was considerably different from the Morton weighted average we recomputed based on the sales, dozens, as shown in the Exhibit 28. And we recomputed the cost, of course, also based on the same corrected product sales averages. We removed from the plaintiff's schedule the item that he had for spoilage, because in point of fact we have no record of any spoilage on fruit pies being paid in the Utah area.

Q. Were there any other differences between this study and the study that I think the record shows was prepared by plaintiff's accountant?

A. Yes. On the schedule prepared by the plaintiff's accountant, he had included our allowances, our sales allowances, our off the face of the invoice, in his selling expense. He had also reduced the net selling price of the invoice

for these allowances. Therefore, they were taken out of the profits twice in his schedule.

Q. So you amended it for that error; is that correct?

A. Yes. We amended it for that error.

Q. Any other changes made that you can recall?

A. Not that I can recall offhand without seeing the other schedule.

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Cross examination.

By Mr. Alioto:

Q. Now, Mr. Hereford, I've just seen these for the first time this moment, so bear with me for a moment.

A. Certainly.

Q. See if we can find out what they are. Now, your first study is a summary of profit and loss, this pencil study, which is your Exhibit M-25?

A. Yes, sir.

Q. I take it that what you have done here, where you have stated "Net Profit," that that is your profit after all business expenses have been deducted? And I mean all business expenses, have been deducted from your sales price.

A. That is our profit after all prime expenses have been deducted from our sales price.

Q. In other words, it is not your profit after all your business expenses have been deducted? Is that correct?

[fol. 588] A. This is—yes, sir, this is the profit after the direct costs that can be allocated to a specific sale.

Q. My question is this. Does 25 represent your profit after you have deducted all of the business expenses you have?

A. No, sir, it is deducting only the prime costs.

Q. Now, then, what do you call the costs that aren't prime? What's the other category?

A. Administrative, general and administrative costs, Expenses, rather than costs.

Q. Now then, let me ask this. Would you be good enough to state for the Court and the jury the specific elements of business expense which have not been deducted from the sales price of your Utah-Idaho area? Or, name all of them.

A. That may be a little difficult, but I'll try.

Q. Well, as the controller, do your best on them.

A. Well, the salaries of general office personnel who have nothing to do with the manufacturing operation, the salaries—

Q. When you say general office personnel, you mean the people in the offices who type up the invoices we are talking about?

A. Yes, sir.

Q. In other words, those people who type the Utah invoices, the very invoices we're talking about, you're not putting their expense against the sales?

A. Well—

Q. Is that correct?

A. They are not typed. They are run on an I.B.M. machine, and it's pretty difficult to allocate the time of a machine.

Q. Then, the girl who runs the machine and runs the Salt Lake and the Utah invoices, the salary of that girl working on these very invoices is not deducted here as a cost of doing business, on your study; is that correct?

A. That's correct.

Q. All right. What else is not deducted?

A. The salaries of all the—everyone in the New York office.

Q. Well, how about the salaries of Mr. Kitchin who was here?

A. They are not deducted.

Q. In other words, any work that Mr. Kitchin did in connection with the Idaho and Utah area, no portion of his salary was allocated as an expense against the sales on your M-25; is that correct?

A. I know of no way to make such an allocation. That is correct.

Q. Regardless of whether you know of such a way to make such allocation, the fact is that is correct, is it not?

A. Yes, sir.

Q. Do you represent as a man familiar with accounting procedures that there is no way of making an allocation of those administrative expenses to specific areas?

[fol. 589] A. No, sir. It would be—well, I don't say there is no way. It would be extremely difficult to make any accurate allocation.

Q. Then, there is a way of doing it, isn't there?

A. I don't know of the way, sir.

Q. As a matter of fact, there are lots of ways, aren't there, of apportioning general overhead expenses to specific areas and specific sales?

A. Yes, sir. You can make such allocations.

Q. And you have seen it done, haven't you?

A. I have seen allocations made of sales by areas, yes, sir.

Q. And haven't you done it within your own organization for internal purposes?

A. We have done it for broad areas, yes, sir.

Q. Surely. Now, these broad areas you've done it for, what is the broadest area that encompasses Salt Lake City and Utah?

A. It would also include Washington, Oregon, northern California, Idaho, Montana.

Q. All right. Now then, you have in fact, as I understand it, apportioned, say, the salary of Mr. Kitchin, just as an example, to that area, haven't you?

A. In attempting to come down to a net, final net profit. Not a contribution to the profit.

Q. I say, you have done it?

A. We have done it.

Q. You have done it internally in your own organization for the benefit of your own people?

A. Yes, sir.

Q. What is the formula you used in allocating the salary of Mr. Kitchin, we'll say, to the area you just described?

A. A percentage of the sales.

Q. That was very easy to do that with this, this Exhibit 25, wasn't it?

A. I don't think it's cogent. That's where I didn't do it.

Q. Well, why is it cogent as applied to the broader area, and why does it become not cogent when you apply it to the narrower area? Would you explain that, please?

A. We don't claim that the study of the broad area is 100 per cent accurate. It is only to give us a general idea of the operation.

Q. Well, we would get the same general idea if you did it here, wouldn't we?

A. We are accurate to the point at which we stopped there.

Q. All right. If you treated your M-25 the same way you treated this broader area for internal purposes, it would result in a loss, wouldn't it?

A. Yes, sir, it would. However, that does not tell the whole story.

Q. I take it from what you've said that you have not allocated any of the corporate salaries or any of the corporate expense to the sales?

A. That's correct.

[fol. 590] Q. Now, even on your direct basis—here it is. Now, let me talk about your M-26, Mr. Hereford. And I want specifically to direct your attention to a period in June of 1961.

A. Yes.

Q. About which we've heard some evidence. Could you quickly turn to that place where I might find that?

A. 1961?

Q. Yes. Can you find a Safeway sale for me there in or about June of 1961?

A. Yes, sir.

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By Mr. Alioto:

Q. That's invoice No. 71576?

A. That's right.

Q. And that shows 3,200 dozens of apple?

A. That's right.

Q. Well, even on your basis, even on this limited basis of applying not all of the expenses against the sale, you suffered a loss on that sale, didn't you?

A. On that sale, yes, sir. But not on the over-all of all our sales.

Q. On the sale you made to Safeway, the one we're talking about, you suffered a loss?

A. Yes, sir.

Q. Now, if you used the same formula on allocating your overhead expenses or your indirect expenses to that sale as you did, for example, in connection with that area, Washington, Oregon, that you describe, the loss would even be greater than that shown on the schedule, would it not?

A. Yes, sir, if we added more expense, the loss would increase, naturally.

Q. Now, on your basis—what figure is that? Six cents?

A. Six and four-tenths cents per dozen.

Q. You lost even on your basis of accounting, six cents for every dozen you sold Safeway?

A. On this particular invoice.

Q. On June 22 of 1961. Now, how about—

A. We made a profit on our sales for the year 1961.

Q. And then we had some testimony about Associated Foods in Pocatello. That's your invoice 72228?

A. Yes, sir.

Q. Now, even on your basis of accounting, you lost money on that sale, didn't you?

A. We lost four-tenths of a cent per dozen.

• • • • • • •

[fol. 591] By Mr. Alioto:

Q. I take it you would agree with me, Mr. Hereford, that if you made this kind of a gross profit, or made the

kind of a profit set out in your M-25 on all other products sold by your company, that you'd be bankrupt?

A. If over a period we made sales on this basis, it would be—we would be, yes, sir. But I would like to make a further statement on this point.

Q. Surely. Make whatever statement you want.

A. Before the allocation of all of these other costs, we do have a profit in the Salt Lake City area. Therefore, our sales in Salt Lake City are absorbing some of the other costs which, without the sales, would have to be absorbed by other areas. They do, therefore, very definitely contribute to the net profit of our whole operation.

Q. In other words, this is what has been previously called in this courtroom a profit contribution?

A. Yes, sir.

Q. But you would agree with me, I take it, that if you had too many of those profit contributions, you'd be bankrupt?

A. Yes, sir, that's true.

Q. Now, Mr. Hereford, one other thing about these costs. Now, incidentally, on that same general subject matter—the evidence in this case, or at least Plaintiff's Exhibit 31 in this case, indicates that your company from the period '58 through '61 on sales of one billion five hundred million made net profits before taxes of $74 million. It would be correct, then, would it not, that any losses you suffered at any time in those years on your frozen fruit pies or your frozen food division, that any losses would in effect be cut in half by virtue of the operation of the Internal Revenue Act? Correct?

A. If I understand the question, based on a 52 per cent—

Q. Yes.

A. —tax, anything is netted out against the over-all corporate picture, that's true.

Q. So that if you lost, for example, $100,000, the loss to Morton by virtue of the operation of the Internal Revenue Act would only be $38,000?

A. The loss to Continental. The loss to the corporation.

Q. To Continental, yes, would only be $48,000?

A. Yes, sir.

Q. And the rest of that would be absorbed in effect by the rest of the taxpayers? Correct, is it not?

A. Well, that—yes, sir.

Q. Now, in addition to that, any losses that you sustained in this area, if the jury ultimately believes that is the situation that developed, any losses that you sustained in this area would in effect be subsidized by profits made in other areas of the country, wouldn't it?

A. No, sir, I don't agree with that. As I have said—

[fol. 592] Q. Well, what would it be subsidized from?

A. It wouldn't be subsidized, because it is making a contribution to the profits of the company.

Q. No. I say, if this jury ultimately determines that these profit contributions, as you have defined them, are actually losses, if the jury ultimately determines that, you have profits in other sections of the company in the frozen food areas which in effect would subsidize those losses?

A. I just don't agree that we are subsidizing anything.

Q. Okay. I guess it's argumentative, anyway. Now, take a look at this study, this M-21—

A. Yes, sir.

Q. —in evidence. That's the chart.

Now, you did not actually prepare this chart, Mr. Hereford?

A. No, sir, I did not prepare it. I checked it.

Q. In other words, after it was all done—

A. I verified the figures.

Q. The first work you ever did on it was after it was all done.

A. That is correct, sir.

Q. So you didn't select this limited trading area, did you, of just Utah and Idaho?

A. No.

Q. Somebody else selected that?

A. I don't know what the basis was of selecting just that trading area.

Q. But actually, if the Intermountain trading area were taken, that is, including Denver, including Wyoming, including Washington, including Oregon, there would, of course, be a lot more sales for the Morton Company, wouldn't there?

A. I presume there would be more sales for all the—for both companies.

Q. Well, the further away you get from Utah, though, the less there would be for Utah—for example, in Denver?

A. I haven't studied the comparison there, so I wouldn't make a comment.

Q. You just checked figures after somebody prepared a picture on them?

A. I checked those figures.

Q. I would just like to talk to you about these cost figures. Let's talk about your apple pies, first of all.

A. Yes, sir.

Q. Defendant's Exhibit 22. You designate these, to begin with, as "Average Cost of Morton Apple Pies Laid Down in Salt Lake City, 1957-61."

A. That is correct, by quarters of the year.

Q. Now, Mr. Hereford, would you be good enough to explain to the Court and jury what you mean by an "average cost"?

A. Well, we can't, obviously, say that this pie that was made on December 21, 1956 was the particular pie that was [fol. 593] delivered to Salt Lake City Wholesale or somebody in the middle of January, 1957. We can only work on an average of our production costs. So we have taken our average cost of producing in each quarter of the year.

Q. In other words, you have taken your total cost, I take it, in the plant—we will take Watsonville—you have taken your total cost there and divided that total cost by the total dozens produced?

A. That is correct.

Q. Is that it?

A. That is correct.

Q. Then to that you have added your freight?

A. That's correct.

Q. Would you be good enough to tell us the underlying documents for the cost reduction set out in your Exhibit 22?

A. What do you mean by the "cost reduction," sir? We had the underlying documents for the costs here that were another exhibit.

Q. That was the exhibit we talked about earlier?

A. Yes, sir.

Q. That Exhibit 1 or 2, whatever it was. Can you tell me, as the controller of this company, in what item, what element of costs is most responsible for the reduction from a 3.75 figure to a figure of about 2.80?

A. One thing I might say, I am not the controller of the company.

Q. I am sorry.

A. I am accounting manager of the Morton Division.

Q. I am sorry.

A. But the one thing that has contributed most to the cost reduction is increased speed in running the pies. We now get 120 pies a minute off our line. I don't know what the figure was in 1957, but it was no where near that speed. We continually work on increasing our economies and our efficiency of production in the plants. This has been sufficient to offset rises that we have had in the cost of raw materials and give us a net decrease in our cost of production.

Q. It is a fact, is it not, that there have been increases in the cost of labor?

A. Yes, there—

Q. During this time?

A. Yes, there certainly have been.

Q. Say, out in California, from 1957 to '61.

A. Of course, these don't all represent California.

Q. But, in any event, there have been—

A. There have been labor increases, yes, sir, definitely.

Q. And there have been increases in the price of ingredients over that period of time?

A. Yes, there have been.

Q. The general price spiral has been upward. Do you know that the relative speed of your machines in 1961 as distinguished from 1957?

A. No, sir, I do not. I only know it has increased tremendously.

[fol. 594] Q. And all of the figures that are set out on this chart are verifiable from the exhibits here in evidence?

A. Yes, sir, they are.

Q. As the direct—give me that title again, sir. You will have to excuse me.

A. General Accounting Manager.

Q. General Accounting Manager of the Morton Division.

A. Yes, sir.

Q. Thank you, I am sorry. As General Accounting Manager of the Morton Division, do you have an opinion of the effect of volume upon cost in the frozen pie industry as it relates to fruit pies?

A. Well, I have a general opinion on the way volume affects cost in any operation, that it tends to lower cost, but I am certainly not an expert in this field. This is more in production.

Q. I take it, however, that you would agree with me that, in the event, for example, the Utah Pie Company had a greater volume than the volume it actually had, that that would be a material factor in reducing its costs?

A. It certainly should be, yes, sir.

Mr. Alioto: We have no further questions, if your Honor please.

Redirect examination.

By Mr. Schafer:

Q. In respect of that cost chart, Mr. Hereford, Morton Exhibit 22, am I correct in understanding that Morton has changed the locale of its production of fruit pies over the years in question?

A. That is correct. That is reflected in that chart.

Q. So that when Mr. Alioto asks you what were the factors causing that cost decline shown in the chart, would you identify the change in the locale of production as one of the factors?

A. Yes, it was a factor. When we were able to pack in Watsonville, we were able to use fresh fruit practically picked off the trees and put in the pies, which helped materially to lower the cost and save us the storage on the raw materials, and so on, all the processing.

* * * * * * *

Q. Is the category "Contribution to Profit," sir, is that a relevant business consideration?

A. Yes, sir.

Q. Does Continental include that category in its accounting studies on profit and loss?

A. Yes, sir.

Q. As a regular course of things?

A. Yes, sir.

Q. Can you describe for us, sir, why "Contribution to Profit" is an important business consideration?

A. Well, the contribution to profit, wherever it may be, that is, the sale of an item above prime cost, helps to defray your fixed overhead, these expenses you are going to have regardless of where or how many pies you sell. [fol. 595] You have got to pay your salesmen's salaries, you have got to pay these officers of the company, you have got to pay your rent and your lights in your home office, and anything that contributes toward defraying this expense is helping your over-all profit picture.

Q. And Morton's Exhibit 25, I take it to be your testimony, does reflect a contribution to profit from operations in the Utah-Idaho area?

A. Yes, sir, it does.

Mr. Schafer: I have no further questions.

Recross examination.

By Mr. Alioto:

Q. Just one thing. Perhaps you can help me on this. There has been some question on it. I show you Plaintiff's Exhibit 14, which is an invoice to the Grocers Wholesale.

A. Yes, sir.

Q. One of the customers on the list. Grocers Wholesale here in Salt Lake City. You will notice that is from Watsonville.

A. Yes, sir.

Q. And what do the letters "PPD" mean in your invoice?

A. It should mean "Prepaid," but in the case with our IBM machines, the girls key punching sometimes get a little over zealous in their punching. They just simply punch an item in that column. It has to have something in that column for it to run through the machine, and sometimes they punch the wrong thing.

Q. But, in any event, "Prepaid" on the invoice means that the freight from Watsonville to Salt Lake was paid by Morton?

A. It means that in the interpretation of the IBM clerk punching the card—

Q. Yes.

A. (Continuing) —this would be in error.

Q. But what I am saying is what it means on the invoice is that the freight, forgetting whether the girl made a mistake or not, what it means is that the freight from Watsonville to Salt Lake City was paid by the seller, namely, Morton.

A. No, sir.

Q. It does not mean that?

A. It does not mean that because that invoice cannot be taken as proof that such freight was paid.

Q. I am not saying that.

A. I will agree with you that it should indicate that, but it does not. I know, because of my knowledge of the opera-

tion, that this type of error—I know has happened, I have seen it happen, that it does not indicate such.

Q. Are we clear, though, that "Prepaid"—

A. "Prepaid" should indicate—

[fol. 596] Q. On the assumption it was not an error, on that assumption, make that assumption—

A. If we make that assumption, it is correct, yes, sir.

Q. (Continuing) —that the girl did not make an error, that means, does it not, that the freight from Watsonville to Salt Lake City was paid by Morton?

A. That would be correct, yes, sir, but, as General Accounting Manager and having studied many of these cases, I would state that this, in my opinion, is very definitely an error on the part of our key punch operator.

Q. That is just an opinion, I take it?

A. This is an opinion, but—

Q. You don't really know?

A. (Continuing) —it is based on a great deal of experience.

Q. But you don't know in this specific case?

A. I cannot say that in this specific case.

* * * * * * *

DUANE S. HALVARSON, called as a witness on behalf of the defendants, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Schafer:

* * * * * * *

Q. Would you describe for me, sir, your employment?

A. I'm the regional sales manager for Morton Frozen Foods.

* * * * * * *

Q. And would you describe for us, please, the territorial area in 1961 that you covered?

A. In 1961, the area encompassed the whole western slope. The states of Washington, Oregon, California, Arizona, Nevada, Idaho, Utah, and Western Montana.

Q. And describe for us generally, please, sir, the products with which you are concerned.

A. We represented the entire Morton line of prepared foods.

Q. What are some of the product categories?

A. Well, pot pies, fruit pies, dinners, casseroles, and numerous and sundry baked goods.

Q. Now, speaking, sir, in terms purely now of fruit pies, could you describe for us the makeup of your western market?

A. The western market consists of eight major markets. Those markets could be called the Phoenix, Arizona, Los Angeles, San Franciso, Portland, Oregon, Seattle, Washington, Spokane, Washington, Salt Lake City.

[fol. 597] Q. And you sell in all of those markets and try to sell in all of those markets?

A. Yes.

Q. How do you sell? Do you have your own sales force, or what?

A. No. We employ brokers, brokers to sell our products in the various markets.

Q. What's the nature of a broker? Is that an organization?

A. Well, we employ frozen food brokers, who represent multiple frozen food lines. In each city they generally have a major or key office which supports anywhere from three to thirty salesmen, depending on the size of the city.

Q. Do you operate through one brokerage operation through this area?

A. In the case of the Morton, we operate with Hamilton Stone Associates, whose main office is in Los Angeles and maintains office in all major cities except Salt Lake City, Utah.

Q. And tell us, please, if you will, sir, what the function of the broker is. For what do you rely?

A. The broker's functions per se is to sell Morton products. His activity in the field is to call on direct buying accounts, chain stores, wholesale grocers, retail accounts, and keep Morton supplied with information and events occurring within the field at all times.

Q. What do you mean by "events occurring in the field"?

A. Oh, I mean price changes, promotional activity, introduction of new products, discontinuance of products that our competitors might have had.

Q. Now, you have identified some seven or so different markets in the Western region. Correct?

A. Correct.

Q. You did not list Denver as one of those markets. Why is that?

A. Denver was not and has never been included in the Western region.

Q. You've identified a Spokane market. Can you tell me what the Morton position in the Spokane market has been from '57 through 1961?

A. '57 to 1961, the Morton position was very, very weak in that market. Distribution was very slight.

Q. Did you operate up there through any salesmen or a broker or what?

A. There were two salesmen, resident salesmen, who reported to the Seattle broker's office, but lived in the Spokane area.

Q. When you speak of the Seattle broker, are you speaking of this Hamilton Stone organization?

A. Hamilton Stone Seattle office.

Q. Did you have any major accounts in the Spokane market?

A. Well, there were major accounts there, but we weren't selling them.

[fol. 598] Q. That's what my question was. Did you sell any major accounts?

A. No.

Q. Then you've identified a Portland market. Can you describe for us, please, what Morton's position in the Portland market was from '57 through 1961?

A. Our situation in the Portland market was similar to Spokane. The market supported, again, two retail salesmen, who in turn reported to the broker's Seattle office, but our distribution and sales to the major accounts in the Portland, Oregon, market were negligible.

Q. Are you familiar with the term, "Intermountain Trading Area," sir?

A. Yes.

Q. Do you conceive that there is one market which is composed of, say, Salt Lake City, Spokane, Seattle, Portland, and Denver, and points in Nevada? Is that one market to the Morton organization?

A. No. We regard the markets individually. You could call the Utah-Idaho market, "Intermountain Area," per se. But each market in our consideration is different from the rest, in that many of these markets supported individual local manufacturers. You'll find different prices of the national packers prevailing in each market. You'll find different laws, selling laws, governing each market. You'll find geographically that one market is more inaccessible, shall we say, or not on a direct path that another market might be the terminus or end of a delivery system.

Q. Is there any relationship between price on one market and price in another market?

A. I would say no.

Q. When I asked you whether or not you were familiar with the term Intermountain trading area and you said yes, did you mean by that that that's what you mean by the Salt Lake City trading area?

A. Yes. Under that classification.

Q. How would you describe the Salt Lake City trading area which you have identified as one separate market in terms of geographical boundaries?

A. Well, I'd say that Salt Lake City trading area was the midway point between—I'm talking of Morton, now—

between our plants in the East and a West Coast destination point. It's comprised of three major buying groups. The State of Utah has a six per cent law requiring retailers, chain store operators, to sell their products with a guaranteed six per cent mark-up over invoice cost.

Q. Do you have different producers competing for the business in the Salt Lake market than you have, say, in the Los Angeles market?

A. Yes. You have a local manufacturer in this market. You have generally producers from all the national concerns, and some from the Western Coast in here from time to time to compete and try and get business.

[fol. 599] Q. How about what you've identified as, say, the Seattle market? Does that have characteristics which you can identify as being different from characteristics here in the Salt Lake market?

A. Seattle is different. It's the northermost, or northwesternmost point of delivery for probably any manufacturer. And close by that locality are two major manufacturers, one of fruit pies—two of fruit pies—and one of pot pies and dinners.

Q. Are the same customers in Salt Lake City as there are in Seattle?

A. I don't quite understand that question.

Q. Would you identify, please, for us, sir—well, let me identify. The record shows, the testimony has been, that there are four major customers in the Salt Lake City market. They've been identified as Safeway and AG and Utah Wholesale and American Food Stores. Now, do they buy for the Seattle area?

A. No.

Q. Well, who are the customers in the Seattle area?

A. Well, Safeway maintains a branch in Seattle, but you'd have Associated Grocers, which would be completely divorced from Associated Grocers in Salt Lake City. You have major chains such as Lucky Stores, Tradewell Stores, Big Bear Stores, which do not have branches here. How-

ever, you do have Albertson's Stores in Seattle, which have stores in the Salt Lake City area.

Q. Well, when you sell, say, Albertson's Stores in Seattle, does that mean that you've made sales for the Salt Lake City area?

A. No, sir, you sell Salt Lake here, and you sell Albertson's in Salt Lake and Seattle at that point.

Q. Am I correct in understanding that in all of the markets that you've identified as being separate, you've got different buyers in all of the markets?

A. You have different buying officers in every market.

Q. And you've said, if I understood you, that the price was not the same, the general level of price was not the same necessarily in all of the different markets.

A. That's true, it is not the same.

Q. Would you describe for us, please, sir, what your function is in regard to what price Morton charges for its products, or offers for sale?

A. My function—I receive reports from the field, I receive reports from the brokers, concerning declines, increases in prices, activity in the market; and usually accompanying that will be a request for some activity on the part of Morton. That is taken into consideration and forwarded to our people in New York for a specific approval, whether asking for a price decline, whether we're suggesting a price increase, which is a rarity, or whether we're suggesting a comparable promotion plan.

[fol. 600] Q. You say "price decline" or "comparable promotional plan." What do you mean by those terms, sir?

A. I say a comparable promotional plan, maybe in-store promotions or demonstrations or an advertising promotion.

Q. Tell us, sir, what an advertising promotion is.

A. Well, an advertising promotion generally is the issuance, after approval, of so much money, 20 cents, 50 cents, a dollar, against the per-dozen cost of products to promote the product in the market.

Q. How does it work? If I understand it correctly, you offer generally to the market a list price and, against that, you offer a promotional allowance?

A. That's correct.

Q. And that is a stated number of cents or dollars?

A. That's correct.

Q. How does the buyer get that money?

A. In the instance of a promotional allowance, which basically is a price cut, he gets that based on performance. He runs an ad in his weekly ad on a product which carries this promotional allowance.

Q. Does he run a separate ad for the Morton product?

A. No. He includes our product in his ad.

Q. You mean in the regular newspaper ad that he runs?

A. That is correct.

Q. Does it matter how many times he runs an ad in order to qualify for the payment?

A. No, he runs it once.

Q. He runs it once.

A. We hope for more, but he always has to run it once.

Q. How do you compute the total number of dollars he gets if he runs an ad once?

A. Well, that is usually computed either through the direct purchase of the product, in which we invoice him, or the records maintained and furnished of a distributor who distributes the product to him.

Q. Is it a part of the offer that he gets the money on only a certain amount of dozens?

A. No, there is no restriction on his purchase. He can buy any quantity, and he is paid on that quantity which he purchases for his ad.

Q. Am I correct in understanding—and correct me if I am wrong—that he gets the advertising allowance payment on as many dozens as he buys during the period of the payment that is being offered, is that right?

A. That is during the promotional period.

Q. Right.

A. Right.

Q. Now, Mr. Halvarson, in recommending Morton's prices for various markets, do you have in mind in, say, recommending a price for the Seattle market, do you have in mind what the price is in the Los Angeles market? Is there any relation between the two?

A. No.

[fol. 601] Q. Upon what do you make your recommendations as to price changes for Morton in the various Western markets?

A. It would be the prices prevailing in that certain market.

Q. And there is no relationship, you say, between, say, the Seattle market and the Los Angeles market?

A. I have never seen that occasion, no.

Q. And there is no relationship between the price you offer in the Salt Lake City market and one of the other markets you have identified?

A. No.

Q. Do you know anything about the Denver market?

A. I know nothing about the Denver market.

Q. Now, speaking particularly of the Salt Lake City market, Mr. Halvarson, can you trace for us Morton's situation in the Salt Lake City market over the years, say, starting— When did you start in the Salt Lake City market?

A. 1956.

Q. Starting then, in 1956, just give us the general picture of what Morton's position in the market has been.

A. Well, in 1956 we came to Salt Lake City and employed a man from our parent company, Continental Baking Company. He was employed for two years locally and made little or no progress. I think it was in '58, middle or late '58. We decided to terminate his operation, and we appointed a local broker, Ken Kammerman Company.

Our association with Mr. Kammerman was probably less than a year, and at his request—and I believe he wrote us a letter stating that he would prefer to terminate the account, and stated that he felt the prices that we had—

Mr. Alioto: Excuse me, if your Honor please, a statement of what is in a letter from another man who is not here, is obviously hearsay, and we will object to it.

The Court: Sustained.

A. (Continuing) He wrote a letter to me and requested we terminate the account.

We made no immediate appointment following this until late in 1960, when Mr. Chapman became a broker, and we appointed Stanley Chapman as our broker. And that is the current status of the market today.

Q. In those periods when you didn't have a direct representative in the market, sir, did that mean that Morton wasn't trying to get business in the market?

[fol. 602] A. No. No, not at all. Although we had no representative, I came very frequently from San Francisco to Salt Lake City in an attempt to call on the trade and get some business. I must admit that I wasn't too successful. So we didn't stop trying to get business here.

Q. Let me show you Morton's Exhibit 32 and 33 for identification and ask you if you can identify, first, 32?

A. Yes. This is a letter from Ken Kammerman Company.

Q. Don't tell us what is in it. Just tell us what it is.

A. Well, he is terminating—

Q. Don't tell us what is in it. From whom to whom and what date.

A. It is from Ken Kammerman Company, signed by Rex L. Vance, October 13, 1959.

Q. Did you receive that letter in the mails?

A. Yes.

Q. And would you identify Morton's 33 for identification?

A. This was a letter which I wrote, acknowledging his letter, two days later, on October 15.

Mr. Schafer: I offer these two exhibits into evidence.

Mr. Alioto: That is objected to. A letter to a third party and from a third party is obviously hearsay. And, furthermore, the man lives right here in Salt Lake City. So we don't need any hearsay.

Mr. Schafer: We got his letter, your Honor, a letter to this gentleman, and his response back.

Mr. Alioto: That's what I say, it is hearsay, third party correspondence.

Mr. Schafer: The letter is right here.

The Court: I know, but—

Mr. Schafer: It says what it says. You don't have to believe the truth of it. All I am offering it for is what it says in the letter, not for the truth of it.

The Court: You mean you are not offering it for the truth of the statement that the letter contains?

Mr. Schafer: Just what he said. Just what he said.

[fol. 603] The Court: Well, surely—

Mr. Alioto: That is the truth.

Mr. Schafer: No, it is not the truth. What his state of mind was in writing the letter. That is all I want it for.

Mr. Alioto: We will submit it.

Mr. Schafer: That is all I want it for, your Honor.

The Court: What is the relevancy of his state of mind?

Mr. Schafer: If he felt that Morton was not competitive in the market. It doesn't prove whether it is competitive or not, but just if he felt it was.

The Court: Objection sustained. If he is in town, why don't you bring him up here?

By Mr. Schafer:

Q. Now, you testified, Mr. Halvarson, that a Mr. Chapman is now your broker in the Salt Lake marketing area?

A. Yes, sir.

Q. Can you tell us, sir, how it came about that Mr. Chapman became your broker in this area?

A. Well, I learned that Chapman had become a broker, and I approached him and asked him if he wanted to carry the Morton line, representing us in the Salt Lake market.

Q. Where did you learn that he had become a broker?

A. I learned that from, actually, the Minute Maid representative in Los Angeles at a sales meeting, when I was attending a sales meeting in Los Angeles.

Q. Can you fix a date for us, sir, as to when you first learned Mr. Chapman was available as a broker?

A. Oh, that would be a Friday, probably the first or second Friday in October of 1960.

Q. What did you do when you learned that Mr. Chapman might be available as a broker?

A. Well, I called him from Los Angeles and tried to make an appointment to see him, and that was accomplished. I came up—

Q. Did you tell him why you were calling?

A. Oh, yes, yes, I told him we had no broker and we were interested in setting up a new broker in Salt Lake City.

Q. What did he say to you?

A. Well, he wasn't too enthused, but agreed to a meeting, say, within the next ten days.

[fol. 604] Q. Did he say why he wasn't enthused?

Mr. Alioto: If your Honor please, that is hearsay.

The Court: Sustained.

By Mr. Schafer:

Q. What happened after the telephone conversation, sir?

A. I came to Salt Lake City and had a meeting with Mr. Chapman.

Q. Can you fix the date about when you came to Salt Lake City?

A. Oh, four or five days after our meeting, mid October.

Mr. Schafer: Would you mark this next in order, please.

(Defendant's Exhibit No. M-34 was thereupon marked for identification.)

By Mr. Schafer:

Q. I show you Morton's Exhibit 34 for identification, Mr. Halvarson. Would you tell us what that is?

A. Telegram to Mr. Chapman.

Q. From whom?

A. From myself.

Q. Dated when?

A. October 10, 1960.

Q. And the second page of Morton's 34 is what, sir?

A. This page here?

Q. This page here, first page on top, I should say.

A. This is a wire to Stan Chapman dated October 17, advising him that samples were being sent to Salt Lake City.

Q. October 17, 1960, is that correct?

A. That's correct.

Q. Mr. Schafer: I offer this in evidence, your Honor.

Mr. Alioto: Well, they are self-serving declarations, but I have no objection.

The Court: Received.

Mr. Schafer: I move to strike the remarks.

Mr. Alioto: No, I mean that. I think they are objectionable.

Mr. Schafer: I don't think they are self-serving.

Mr. Alioto: I make an objection on the ground they are self-serving declarations.

[fol. 605] Mr. Schafer: You didn't. You made no objection.

Mr. Alioto: I am making it. That's what you wanted me to do.

The Court: The objection is sustained.

Mr. Schafer: Your Honor, this is not self-serving. It simply states a chronology.

Mr. Alioto: It is not a letter to this plaintiff. It is not directed to the plaintiff. It is written by Mr. Halvarson. If you want him to fix a date, you can't do it by a declaration—

The Court: You fellows can't write letters to one another and bring them in here and introduce them against the plaintiff, who didn't know anything about it, wasn't a party to it, never received a copy of it. That is what a self-serving declaration means. The objection is sustained.

By Mr. Schafer:

Q. Does Morton's Exhibit 34, Mr. Halvarson, refresh your recollection as to the date on which you called on Mr. Chapman at the Salt Lake City Bakery?

A. May I see the letter again?

Q. Surely.

A. Yes. I would say it was the 14th of October. It was sent on a Monday, and I came up about the 14th.

Q. So, so far as you can recall, you had a conversation with Mr. Chapman at the Continental Bakery on October 14. Can you state the substance of that conversation, please?

A. We discussed at length the Morton line, his representing the Morton line; if accepted, what brokerage would be paid him. I reviewed completely with him the 50, 55 items contained in the Morton line, which he could represent and sell. I think I even approached him at that time with news that we had—and plans that we had for production in California which would afford us perhaps a better chance to be competitive with some products than we had had heretofore.

Q. Will you tell us what he said to you. I take it that is what you said to him.

A. Well, at the termination of the meeting he was in agreement and said that he would go along and represent us in the market if I could get approval from New York for his appointment.

Q. And you undertook to try to get approval?

A. I returned to San Francisco and called New York and gained approval for him, and started him off.

[fol. 606] Q. Was there any discussions, sir, at the meeting at the Bakery, of the Utah Pie Company that you can recall?

A. I can't recall anything.

Q. Can you tell us, sir, according to your best recollection, when you first heard that Mr. Chapman had been negotiating with the Utah Pie Company to be the Utah Pie Company's broker?

A. Well, he probably mentioned something about it in one of our first meetings upon my return to Utah, but it was not a topic of discussion that I would remember any facts of.

Q. Did he ever tell you, sir, that he had gotten mad at the Utah Pie Company or any of its representatives?

A. No, sir.

Q. Did you start Mr. Chapman off as a broker with a promotional arrangement of any sort?

A. For the immediate, we secured approval to put the same promotional allowances—I believe they were on fruit pies, pot pies, and casseroles—existent in San Francisco in the Utah market. That would be late October.

Q. Let me show you Morton's Exhibit 35 for identification. Is that, according to your best recollection, sir, the first price promotional offer that you gave to Mr. Chapman for the Morton line?

A. Yes. These are the allowances which we had in San Francisco.

Mr. Schafer: I would like to offer this, your Honor, simply to fix the date of the first offer Mr. Chapman had available to him as a broker.

Mr. Alioto: We have no objection.

The Court: Received.

(The document marked Defendant's Exhibit M-35 for identification was received in evidence.)

By Mr. Schafer:

Q. Can you tell us, sir, whether or not Mr. Chapman had any success selling Morton's apple pies with the promotional offer evidenced by Morton's Exhibit 35?

A. He had none.

Q. Did you give Mr. Chapman any other promotional offers during the next few months?

A. We had continual allowances on other products. I believe casseroles, dinners, pot pies, and of course, fruit pies.

Q. Did you determine what those promotional allowances would be in amount?

A. Well, we gave him the allowances which prevailed in San Francisco.

[fol. 607] Q. I see. Can you state for us, sir, what success Mr. Chapman had with those allowances in the Salt Lake City market?

A. He sold a smattering of product. Not in Salt Lake.

Q. Nothing in Salt Lake?

A. Nothing in Salt Lake. He sold some product up north, in Idaho, and I think had a few orders out of Ogden.

Q. Now, how long was it, if you know, sir, how long was it after Mr. Chapman became a broker for Morton that he finally sold some of your products, fruit pie products, in the Salt Lake City market?

A. About eight months.

Q. And can you recall for us what that price was that he secured orders in eight months after starting?

A. He had an allowance of $1.15 a dozen on apple and coconut pies.

Q. Can you state for us, sir, how it was determined that he would have an allowance of $1.15 on apple pies?

A. Yes. It was found that the prevailing price of fruit pies in this market, Salt Lake City, was $3.10 a dozen delivered. It was noted Safeway carried Bel Air and Swiss Miss, Associated Grocers carried Frost 'N' Flame, Utah pies; there was some talk at that time of, in Grand Cen-

tral—then it would be Grand American—of the Mayfresh label. And we wanted to put in a short term promotion at a comparable price. In talking with the buyers, we found that they objected to our size, the 22-ounce size. So we went and figured it and computed it on a per ounce basis and came up with a price of $2.85 as our offering to the entire market for a two week period.

Q. Per ounce basis with what?

A. On apple pie.

Q. What is the $2.85?

A. Oh, equivalent to a 24-ounce pie.

Q. I see.

A. 24-ounce pie.

Q. And am I correct, also, in understanding, sir, that you had at the same time a freight allowance that you offered to the customers as an alternative to the $2.85 price?

A. Well, we offered a freight allowance. Many of the customers in this area picked their own products up on the west coast and in southern California. Citrus juices, strawberries, fruits, and the like. And it's customary to receive a request or make an offer for a pickup allowance, as we call it, from a West Coast production point.

Q. How do you determine the amount of pickup allowance?

A. You take it on the basis of what the P.U.C. rate would be. And in this instance it was about 30 cents a dozen.

Q. Was the freight allowance or pickup allowance peculiar to the Salt Lake City market?

A. Not at all.

Q. Do you have them in other markets in the West?

A. We have them in Seattle. We have them in San Francisco.

Q. Do you have them in Los Angeles?

A. No.

[fol. 608] Q. Did you have them in Los Angeles in 1961?

A. No.

Q. Now, can you state for us what the effect was in terms of Morton's business in the Salt Lake market of this $2.85 price?

A. Well, we got, we got two orders out of Safeway Stores on fruit pies.

Q. Was that all?

A. That's all, at that time. We got orders at other points. In Pocatello. We got orders in Ogden.

Q. And you had two orders, you say, to Safeway?

A. Yes. They bought two orders of approximately two weeks supply.

Q. Now, was there an occasion on which you cancelled one of their orders?

A. Not that we cancelled. They cancelled. Their initial order was given to Chapman, and Chapman called me and told me that he didn't have the order, that a competitor had underbid him and that Safeway wanted to get out of their commitment. And it was in a, such a position, and it was on a week end, as I remember, that there was absolutely nothing we could do about it except hold up shipment. But he later had the order reinstated, and it was shipped.

Q. Do you know, sir, of any occasion in your knowledge where a 24-ounce pie has been priced in an amount less than a 22-ounce pie on a per dozen basis?

A. I know of no such time that that has ever happened.

Q. Is it your experience as a salesman, Mr. *Chapman*, that a buyer in the industry will insist upon a lower price for a smaller or a less heavy pie, lighter pie?

A. He insists on it.

Q. Is it your judgment, Mr. Halvarson, as a salesman, that the Utah Pie Company has competitive advantages over Morton in competing for the business in the Salt Lake City market?

A. They have distinct advantages, in that they are local.

Q. What does being local do for them?

A. "Local" permits them to make quick and efficient delivery, makes available, I assume pickup at their plant, accommodating the customer. I would say that any local

name such as they use would be an advantage in a market. This is the State of Utah, and this is the capital of the State, and they have the Utah Pie Company. I think that's an attraction.

Q. Now, your $2.85 price, was that a truckload price or an ex-warehouse price, or what was that price?

A. That's a truckload price. And that, by the way, is an advantage they had over us, because they, being so close to the customers here locally could deliver, and I guess would deliver, in smaller quantities whereas we had our pricing based on approximately 30,000 pounds of pies at this price.

[fol. 609] Q. What does 30,000 pounds of pies mean in terms of dozen?

A. That's about 2400 cases.

Q. So that the buyer had to buy 2400 cases—am I correct in understanding this—in order to get the lowest price you quoted?

A. That's right.

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Q. Mr. Halvarson, let me show you Exhibit 19, which is the letter previously identified as being from Mr. Nightingale to Mr. Chapman and call your attention to the statements that Mr. Chapman is advised and confirms that on the effective date September 26, 1960, he becomes the Morton broker. Is that, Mr. Halvarson to your knowledge an error made by Mr. Nightingale in writing this letter?

A. Yes, it is.

Q. The proper effective date would be what?

A. October 26.

By Mr. Schafer:

Q. I show you, Mr. Halvarson, Morton's Exhibit 36 for identification, Mr. Halvarson, which is a group of documents. Would you just quickly read through them, please, and tell us generally what they are?

A. These are announcements, bulletins, put out by wholesale grocers announcing the promotions in the market, in various markets you have here, plus wires, my wires to New York, to product managers there, advising them of price declines and promotional allowances.

Q. Does this group of documents, Mr. Halvarson, include the sources by which you receive competitive information and the method by which you report it to Rye, New York?

A. Yes, they do.

Mr. Schafer: I offer these in evidence, your Honor, as documents written in the ordinary course of business to show a pattern of conduct, not for the truth of the matters asserted in each document.

Mr. Alioto: If your Honor please, if they're not offered for the truth of the matters, they're irrelevant; and if they are offered for the truth of the matters, they are self serving declarations, internal documents written by people who are well schooled in what the law requires; and, therefore, I submit they are objectionable.

Mr. Schafer: Your Honor, they report, for instance, Mr. Halvarson reporting to Rye, New York, what the Pet activity has been in the certain market or what the Simple Simon activity has been in asking for price changes in order to meet that competitive activity. I'm not concerned with whether or not the price is accurately stated in the telegram. I'm simply seeking to show how it is that Mr. Halvarson, and through the Morton organization, seeks to meet the competition afforded in the various western markets.

[fol. 610] The Court: Hearsay.

Mr. Alioto: This is the vice of the matter. They can prove what Pet and Carnation did by competent evidence.

Mr. Schafer: This is competent evidence. It's not hearsay.

The Court: Objection sustained.

Mr. Schafer: Would you mark this next in order?

(Defendant Morton's Exhibit No. M-37 was thereupon marked for identification.)

Mr. Schafer: Without taking the time to have the witness identify this, your Honor, this is a group of documents reporting the competitive activity from companies not parties to this action; and I offer it again for the same reason, to show a pattern of conduct, how it is Morton meets this competition.

Mr. Alioto: Same objection, if your Honor please. Those facts can be proved competently by subpoenaing the local witnesses here. Same objection.

The Court: Same ruling.

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By Mr. Schafer:

Q. I show you, Mr. Halvarson, Morton's Exhibit 38 for identification and ask you to state what that is?

A. That is a Morton regional outline of the various districts within the Western Region, with the exception of 7-3, which is your Denver area.

Q. In other words, 7-3 or I-63, is not within this Western Region?

A. No, but the other districts are.

Voir dire examination.

By Mr. Alioto:

Q. As of what time does this map speak?

A. That is current.

Q. You mean as of today?

A. Yes. That is the way it has always been.

Q. That is different. In other words, these price zones that you have on the map have been this way from 1958 down to the present time, is that correct?

A. Those are the Morton districts.

Mr. Alioto: We have no objection, if your Honor please.

[fol. 611] Direct examination (continued).

By Mr. Schafer:

* * * * * * *

Q. Mr. Halvarson, when you say "we," do you mean you?

A. I mean our office, yes.

Q. And you are your office, aren't you?

A. I am my office.

Q. You are a one-man office, aren't you?

A. Right.

Q. How about when Mr. Chapman—he is also one of your brokers—when he sends along reports of competitive activity and asks for price concessions to meet that activity, do you always adopt and send along to Rye his requests?

A. No.

Q. You have rejected his requests from time to time?

A. Yes.

Q. Have you ever raised your price in one of those markets that we see on that map in order to compensate for a price decrease in another market?

A. No.

Q. You testified yesterday, Mr. Halvarson, that you were in the market from 1956 through, I think you said, sometime in '59, and then you lost your representation and you tried to make some sales, but you didn't have any direct representation, and you came back in with representation in 1960. My question to you, sir, is: whether or not there was any change in the conditions of the market in Salt Lake City between the time you stopped having a direct representative here and the time you picked up a new representative in October of 1960?

A. Well, I believe I testified that there was talk of more private label activity, namely, Mayfresh label. There had been a decline in pricing, particularly on fruit pies, during that period.

Q. Was that attributable to the private labels, is that what you are testifying?

A. I think that had a part in it, yes.

Q. The price structure, am I correct in understanding, was lower in 1960 when you came back in with a direct representative than it was prior to that time?

A. Relying on my memory, I would say that it was lower.

Q. And in 1960 and early 1961 there was considerably more private label activity, is that what you say?

A. Yes.

* * * * * * *

Q. I offer Morton's Exhibit 39 in evidence.

Mr. Alioto: If your Honor please, this is an inter-office memorandum again from this witness to Mr. Kitchin, both of whom have been here, and it is obviously hearsay, was never received by the plaintiff, nor has it come to the plaintiff's attention.

Mr. Schafer: You can cross-examine.

[fol. 612] Mr. Alioto: Object to it on that ground.

Mr. Schafer: You can cross-examine on it.

Mr. Alioto: That is no reason for putting in hearsay.

Mr. Schafer: This is not hearsay. It is a report by a man in the ordinary course of his business, who is reporting on competitive activities with respect to the Bel Air label, reporting that the Utah Pie Company has gotten the business.

The Court: The statements in that document are unsworn, and the statements in that document are not subject to cross-examination, and that is hearsay—

Mr. Schafer: I want to make it clear—

The Court: (Continuing) —in anybody's book.

Mr. Schafer: I want to make it very clear, your Honor, that I am not offering it for the truth of whether or not the fact is that the Utah Pie Company got the business. That is not what I am offering it for.

Mr. Alioto: What are you offering it for?

Mr. Schafer: I am simply offering it to show that the witness was concerned about the Bel Air business, that he was competing for it at this time.

The Court: Put him on the stand.

Mr. Alioto: The witness is on the stand. He can ask him about it, and he already has asked him about it.

Mr. Schafer: This supports his testimony. This is a document written contemporaneously, at the time, with no reason to prevaricate.

The Court: It is unsworn. It hasn't been cross-examined upon. You can examine him. The fellow is here. He is on the stand. He is under oath. You have already examined him on the subject. The objection is sustained.

Mr. Schafer: I think it is a business record, your Honor.

[fol. 613] The Court: Well, sure.

Mr. Schafer: I have just been handed some authority, your Honor, I am not quite prepared to discuss it with your Honor.

The Court: And I am not prepared to hear you.

Mr. Schafer: We have some authority here.

The Court: You are the fellow who is talking about wanting to get this testimony on.

Mr. Schafer: Yes.

The Court: Put it on.

Mr. Schafer: Yes, I would like to.

The Court: Let's get it on.

Mr. Schafer: I have no further questions.

Cross examination.

By Mr. Alioto:

* * * * * * *

[fol. 614] Q. Now, it is a fact, is it not, Mr. Halvarson, that the lowest price your company has charged since 1957 to the date of the filing of this complaint was that $2.55 price that Safeway and others got by going out to California and picking up your pies in Watsonville?

A. Yes, Mr. Alioto, we called it a $2.85 price, which was a quotation to the customer, and that is the lowest price on apple pie.

Q. That's the lowest price that has been charged in your whole region on apple pie; is that correct?

A. That's correct.

Q. Now, that price was aimed right at this plaintiff, wasn't it, Mr. Halvarson?

A. No, it was not.

Q. Mr. Halvarson, I'd ask you—I'll put it this way—I'm going to read to you a question and answer that you gave in your deposition on November 16, 1961; and after I've read the question and answer, would you be good enough to state whether or not you gave that question and answer on that date. Page 86 of that deposition.

"Redirect examination.

By Mr. Alioto:

"Question: Do I understand from the testimony, Mr. Halvarson, that your price of $2.85 per dozen on apple pies was aimed right at the plaintiff?

[fol. 615] "Answer: It was aimed at him as a competitor to get business in his customers' account."

Were you asked that question and did you give that answer on that occasion?

A. If it's in my deposition, I did.

Q. Yes. Now, on the other hand, the fact remains, does it not, Mr. Halvarson, that you never did recommend a price for the purpose of meeting either Pet's competition in the Salt Lake area or Carnation's competition in this area? That's a fact, too, is it not?

A. No, I don't believe it to be a fact. It was requested to meet all competition in the market.

Q. I'd like to read from your deposition at page 52, Mr. Halvarson, and then ask you whether you were asked these questions and gave these answers.

"Question: Would it be correct to say within the past four years that the only time you made a recommendation that the price be lowered was made in connection with meeting the competition of Utah Pie Company?

"Answer: That is correct.

"Question: Did you ever suggest lowering of a price to meet the competition of Simple Simon?

"Answer: No.

"Question: Of Pet?

"Answer: No."

Were you asked those questions, and did you give those answers at that time?

A. If it's in the deposition, I did.

Q. Now, I take it that at the time you were making the sales in the Salt Lake area, Mr. Halvarson, that you were aware of the fact that those sales were being made at a loss?

A. No.

Q. May I ask in connection with page 33 and 34 of your deposition, whether you were asked these questions and gave these answers:

"Question: How long have you been distributing pies in Utah or in Mr. Chapman's district?

"Answer: Since 1959.

"Question: Approximately two years?

"Answer: 1958 we started.

"Question: 1958. Approximately three years?

"Answer:

"Question: You are nodding. I take it you mean yes?

"Answer: Yes.

"Question: As you sit there, you don't know whether you have made money or lost money on the pies that you distributed in Mr. Chapman's district?

[fol. 616] "Answer: Well, we have—yes, I know.

"Question: Have you made money?

"Answer: No.

"Question: You have lost money?

"Answer: Yes."

Do you recall giving those answers to those questions?

A. If it's in the deposition, I gave those answers.

Q. All right. Now, do I understand from your testimony from yesterday, Mr. Halvarson, that when you first came in here with your price in June, in or about the summer of 1961, that you first came in at exactly the same price as Frost 'N' Flame, namely, $3.10, and thereafter went to $2.85? Did I understand your testimony correctly on that?

A. I thought we came in at $2.85. We came in at $4.00 less $1.15 TPD.

Q. Now, what does TPD mean?

A. Temporary price decline.

Q. Temporary price decline. That's a straight price cut?

A. Right. Off the invoice.

Q. Now, you at this time were selling a 22-inch pie, and the Utah Pie Company, Mr. Halvarson, was selling a 24-inch pie. That's correct, is it not?

A. That's true, yes.

Q. Now, actually it's very difficult to tell the difference between a 22-inch pie and a 24-inch pie?

A. Yes, it is.

Q. And you would agree with me, I take it, that the housewife looking at these two pies really couldn't tell the difference between them?

A. That is correct.

Q. The price that you came in at, would you say, was the lowest price in any part of your region? This price that you used in Salt Lake City was a price that was fixed by the people in New York, wasn't it?

A. I don't understand what you mean by "fixed."

Q. I mean in this sence, that the final decision on the pricing policy to come in here with the lowest price that you had in your area in the entire period of time was made by a man named by Vail in New York City; isn't that correct—or, in Rye, New York, rather?

A. I believe the approval for price was given by the product manager, Mr. Fred Roche at that time when we requested a $2.85 price. And I'd like to add something to that, that the price was not prevailing only in Salt Lake, but also in Los Angeles at that time.

Q. $2.85—

A. Yes. I think the evidence will show that we had $1.15 TPD, or a dollar fifteen—yes, TPD in Los Angeles at the same time. Now, it might not have started on the same date, but it was in that area.

[fol. 617] Q. I won't quarrel with you about what the evidence will show. We'll bring that out later. But as far as this price related to the Salt Lake City area, the final decision to put that price into effect was made by a man in your principal office in New York City, wasn't it?

A. The product manager.

Q. Or, in Rye, New York?

A. Rye, New York.

Q. And that is the principal office of the Continental Baking Company?

A. Yes.

Q. However, the recommendation to put that price into effect first came from a man named Stan Chapman, didn't it?

A. The request came from Stan Chapman.

Q. Yes. And he also recommended that that price be put into effect here?

A. He requested that it be put, yes.

Q. Yes. And it was upon his recommendation, Stan Chapman's recommendation, that you recommended or requested of your New York office that authority to put that price in the Salt Lake area be given?

A. That's correct.

Q. I take it, Mr. Hälvarson, it was your purpose in recommending that low price in the Salt Lake City area, it was your purpose to acquire new accounts for your company? Is that correct?

A. Well, yes. We had no business here.

Q. Okay. So you didn't put that price into effect for the purpose of preserving an existing customer?

A. No. We were competing with an existing customer.

Q. What I mean is you didn't have—you put the price into effect to get new business, rather than for the purpose of saving a customer you already had before the price cut? That's correct, isn't it?

A. Well, yes, Mr. Alioto, but whenever we put a price in, we always tried to get new business. I mean, that's the purpose of having an allowance, or having a promotion, or advertising, is to get new business.

Q. And that was your purpose in making this price cut in the Sale Like City area?

A. That's the honest truth, yes.

Q. Now, it is a fact, is it not, that at the time you had this very low price in the Salt Lake City area in June of 1961 that you didn't have that same price in every one of your pricing zones?

A. No, I think it existed in Utah, Los Angeles, and I believe Arizona, at that same period of time.

Q. In other words, using your price zone, using this map of yours for just a second, that low price in Utah, in Salt Lake City, was not matched by a comparable low price or the same low price in Oregon or Washington, northern California, Colorado, or Arizona? That's correct, is it not?

[fol. 618] A. No. I mentioned Arizona as being a participating area.

Q. Oh. Excluding Arizona, then.

A. And Denver, I would know nothing of, because that's not within our area.

Q. But then, the rest of the area maintained a higher price than you had in Salt Lake City?

A. At that time I believe it did, yes.

Q. Yes. And your purpose in having that price different at that period of time was to acquire new business in Salt Lake City?

A. Yes.

Q. Okay. Now, I want to get back to Mr. Chapman again. It was Mr. Chapman, you remember, who recommended this very low price to you. Isn't it a fact that you first started looking for a broker—well, let's get the chronology first. You went out of the market. You withdrew from this market.

A. No, I never withdrew from Salt Lake City.

Q. You never withdrew from Salt Lake City?

A. No, sir. I had little or no sales activity, and no representation here, and you may term that a withdrawal, but we were still interested in the market, and I still made trips here in an attempt to sell some merchandise.

Q. I'd like to call your attention to your questions and answers, Mr. Halvarson, in your deposition, again, given on November 16, 1961, on page 37, after you were speaking of the withdrawal of Kammerman. Do you remember him?

A. Oh, yes.

Q. Your broker?

A. Uh huh.

Q. After speaking of him, the following questions were asked you and the following answers were given by you. Page 37.

"After the resignation of this company, what happened?

"Answer: Nothing.

"Question: Did you withdraw from the market?

"Answer: Yes.

"Question: For how long a period of time?

"Answer: Approximately a year."

I take it you were asked those questions?

A. Yes.

Q. And you gave those answers, Mr. Halvarson?

A. Yes.

Q. Now, in any event, you started looking for a broker again sometime in June of 1960, didn't you?

A. I can't pinpoint June 1960 as being the exact date of looking for a broker, no.

Q. Well, would you say that you started looking for a broker in the summer of 1960, then?

A. I don't recall.

[fol. 619] Q. For this area?

A. I don't recall. We were constantly alert for any acceptable brokerage arrangement after Kammerman.

Q. When did it first come to your attention that Mr. Stan Chapman was going to leave the Associated Grocers? Approximately when, Mr. Halvarson?

A. His departure and establishment in his brokerage business came to me at the same time through information from an associate in Los Angeles, a Minute Maid representative.

Q. Now, that was sometime before he actually left Associated Grocers, wasn't it?

A. No. It was in early October at a sales meeting where we all participated in a sales meeting. And Les Michaelson is his name. Mentioned to me that "have you heard that Stan Chapman is now a broker?" And I said no. And he said, "You have a broker in the market?" And I said no. I said, "Do you think he'd be interested?" And we discussed it, as associates will, and I recalled and talked to Chapman.

Q. Now, do you date your call to Chapman in the beginning of October?

A. It was either the first or second Friday in October.

Q. The first or second Friday in October. All right. Now, after you talked to him, then, you had a visit with him here in Salt Lake City?

A. I came up the next week, as I remember.

Q. The very next week?

A. Yes.

Q. And then, after your visit with him, I think you said you went back to Redwood City and made a call to your Rye, New York office, or did you call them from here?

A. No, I went back to Redwood City and called them.

Q. All right. You called your Rye, New York office, and you got approval to put Chapman on as a broker?

A. Yes.

Q. And he was a broker from there on in, wasn't he?

A. Yes.

Q. Now, that was long before October 26, wasn't it?

A. I'd say—let's see, tying down to dates there—it wasn't much before the 26th of October.

Q. Okay. As soon as Mr. Chapman was appointed a broker, or shortly after he was appointed a broker, I take it he told you, at least, that he had tried to get the account of the Utah Pie Company?

A. If he mentioned anything about his association with Utah Pie Company, it was casually, and I don't remember the content of the conversation.

Q. Okay. In any event, Mr. Halvarson, you would not deny, would you, that at or about the time that you were talking to him in connection with his being your broker, that he might have mentioned his negotiations with the Utah Pie?

[fol. 620] A. He never mentioned it during our negotiations.

Q. Or shortly before his appointment as a broker of yours, he at least—you don't deny that he might have mentioned it to you?

A. I don't deny, but I don't remember his mentioning it.

Q. All right. Now, shortly after his appointment as a broker, you immediately gave him an 84-cent allowance to get business in the Salt Lake City market, didn't you?

A. Yes, sir.

Q. And that allowance was not in effect, was it, in all of the other price zones that you've set out in your exhibit which is numbered M-38?

A. No, I believe it was the exact allowance structure that was offered in 8-1, or the San Francisco area.

Q. And in all of the other areas there was not an 84-cent allowance, was there?

A. No. I think there was $1.15 in Los Angeles, probably 66 cents in the Northwest. There would be a variance, yes.

Q. There would be a different price in the areas, wouldn't there?

A. Yes, there generally is.

Q. And here again, you gave him that 84-cent allowance on apple pie for the purpose of getting new business, not of maintaining old business, didn't you?

A. Yes.

Q. Just one last thing on the appearances of these pies. We'll see if we can't get a visual exhibit on that one. I'll see if I can't juggle this. I think we're very fortunate, if your Honor please, that this isn't a frozen fish case. Mr. Halvarson, I want to show you the Morton pie about which we've had a good deal of conversation, the Morton apple pie in this hand, and the Frost 'N' Flame of the Utah Pie Company in this hand. Now, you would agree with me, I take it, that from the size of the box there is no discernible difference in weight?

A. That's right, that's right.

Q. Now, in order to get the weight, you'd have to look in the—the Morton box has the weight up in the left-hand corner, doesn't it?

A. Yes.

Q. Net weight, 1 pound 6 ounces. Now then, when you look at the pies themselves—and I'll be sure and take the

right one—in my left hand I have the Morton pie, as you can see.

A. That's the first Morton pie I've seen in Salt Lake in a long time.

Q. I trust, Mr. Halvarson, it was sold at a price higher than $2.55. Now, this is your Morton pie in this hand?

A. Yes.

Q. And this is your Utah pie?

A. Yes.

Q. You'd agree with me it would be very difficult to tell any difference in the size of these pies just looking at them from here?

A. That's correct.

[fol. 621] Q. Actually, the only difference is in a sharper slant in the pie in my left hand in the pan? If you have it up from the bottom, there would be a slightly sharper slant. But even that isn't quite discernible to the eye, is it?

A. No, it's not.

* * * * * * *

Redirect examination.

By Mr. Schafer:

Q. You were asked, Mr. Halvarson, whether or not in quoting the $2.85 price in June of 1961 in the Salt Lake market, whether or not that was aimed at the plaintiff company; and I think you testified that it was aimed at the plaintiff company in respect of the business represented by the Frost 'N' Flame brand. Is that correct?

A. That's correct.

Q. The plaintiff company had the Frost 'N' Flame label; is that correct?

A. That's correct.

Q. And that Frost 'N' Flame label was bought by and distributed by the A. G. Stores?

A. Correct.

Q. And you had some hopes, did you, of getting some business in the A. G. Stores?

A. Correct.

Q. And in that regard your price was aimed at the plaintiff company?

A. Correct.

Q. Did you have any hopes of getting business in any other of the buyers in this market with that price?

A. Yes, sir.

Q. Did you hope to get business in those other outlets?

A. We hoped to get business in Safeway, Grocers, Wholesale, Utah Wholesale, anyone who would and could buy apple pies.

Q. You were asked whether you had ever quoted a price which was intended to meet the competition of Pet or of Carnation; and my question to you is whether or not in any of the markets in which you deal, you ever did try to meet the price of Pet or Carnation?

A. We do that, I would say, and have always done that when necessary, requested a price to meet a Carnation or a Pet price that's lower than ours.

Q. Do you recall, Mr. Halvarson why you didn't, in June of 1961, quote a price which would be equivalent to, say, the Simple Simon price?

A. Well, I thought I explained that the prevailing price for apple pie in the market was $3.10 delivered.

Q. Whose price was that?

A. That was Frost 'N' Flame. We went over to Grand Central, I think it was—Grand Central advised us they were going to have a private label. They wouldn't tell us what the price was going to be, but from indications it would be in that area. Pet Company had successfully locked up Safeway with the Swiss Miss, and they seemed to us to be the most vulnerable of the group, and yet we didn't [fol. 622] know what Swiss Miss's price was, but we knew what the prevailing price was. And to offer all customers the same price, we had to meet the low man in the market. And that's what we did.

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By Mr. Schafer:

Q. Would it have been possible in your judgment, Mr. Halvarson, to get any business at the AG Stores with a price only equivalent to the Swiss Miss price?

A. No, I don't think so, because the evidence we could find —and it was pretty difficult—was that the Swiss Miss price was higher than the Frost 'N' Flame price at that time. So offering a price comparable to Swiss Miss would have been higher than Frost 'N' Flame.

By Mr. Schafer:

Q. How about that 84-cent price that there was testimony about on cross-examination, Mr. Halvarson? Did that, in your judgment—was that sufficient to meet the price quoted by the plaintiff company?

A. Would you ask that question again, please?

The Court: Well, don't suggest the answer.

Mr. Schafer: I didn't mean to.

By Mr. Schafer:

Q. In your judgment as a business man, Mr. Halvarson, was the 84-cent advertising allowance, to which you testified, sufficient to meet competitively the price being charged by the Utah Pie Company?

A. No, I don't think it was at that time. I think we found out that it wasn't at that time.

Q. There was testimony earlier that there were other price offers before this June price offer and, in respect to those price offers, Mr. Halvarson, were they, in your judgment, sufficient to meet the price being charged by the Utah Pie Company?

A. They probably met on occasion the price, the current offering in the market. My memory doesn't give me the exact pricing on that. But we had offerings on fruit pies, and pot pies and dinners, and casseroles all during the period prior to the April date, and I can't accurately tell

you whether it actually met the price of the competitor at that time. I am quite sure it did, because that would be the offering we would make.

Q. I am talking about the Utah Pie Company.

A. It undoubtedly came to the Utah Pie Company's price at that time, because that would be the nature of our offering, to be competitive.

Q. In respect to the Frost 'N' Flame $3.10 price?

A. The Utah Pie at that time.

[fol. 623] Q. You are talking about the Utah label?

A. Yes.

Q. I see. Do you know whether or not you got any business with these offers in the Salt Lake City market prior to the June, 1961 price offer?

A. On fruit pies?

Q. Yes, on fruit pies.

A. No.

Q. Have you made money in the Western Region, Mr. Halvarson?

A. Well, we get sort of a P & L sheet quarterly, four times a year, which merely shows us whether we are in the black or in the red. As far as making money in Salt Lake City, precisely, I know not.

Q. I am talking about the Western Region.

A. In the Western Region we have made some money.

Mr. Alioto: If your Honor please, I submit that the books and records speak for themselves, that they have an accountant—

Mr. Schafer: You asked about it.

Mr. Alioto: Okay.

By Mr. Schafer:

Q. Are you concerned about making a profit, Mr. Halvarson?

A. All the time.

Q. Why?

The Court: Oh, well, that is obvious.

Mr. Schafer: I would like to have him explain it.

The Court: You are the fellow who wants me to hold overtime, hold the jury overtime today.

Mr. Schafer: There is an insinuation—

The Court: And you ask a question like that.

Mr. Schafer: There is an insinuation, your Honor, that he is not, that he is not concerned.

The Court: Well, he said, of course, all the time, he is interested in making a profit. Why? Why, it is obvious.

By Mr. Schafer:

Q. Did you ever withdraw from the Salt Lake City market voluntarily?

A. I consider withdraw retreat, and I never retreat.

Q. Do you know why you lost your representation in the Salt Lake market in 1959?

[fol. 624] A. There was nobody calling on the trade and selling the customers.

Q. I am talking about why you lost the representative you had.

A. He resigned the account.

By Mr. Schafer:

Q. Do you know whether or not the effect of your 2.85 price quotation to Safeway in June of 1961 had the effect of getting any business away from the Pet-Ritz Company?

A. Well, yes. We moved into the cabinet where Swiss Miss had formerly been.

Q. I am going to show you another group of documents, Mr. Halvarson, very quickly, which have been marked Morton's Exhibit 40 for identification and ask you if you can just tell me whether or not these are documents that you either wrote or received?

A. Yes, they are.

Q. In the ordinary course of your business?

A. Yes.

Mr. Schafer: I offer these documents, your Honor, simply to show the chronology of Mr. Halvarson's efforts in the Salt Lake City market to secure representation to secure sales, not for the truth of the matters in the documents.

Mr. Alioto: This is the same question, internal documents, self-serving declarations. And since the electrical cases, it seems to me there can't be any possible question about their inadmissibility.

The Court: Sustained.

Recross examination.

By Mr. Alioto:

Q. I want to show you Subsections 1 and 2 of M-20, which were displayed to you against the white border.

Mr. Schafer: Do you want the border?

Mr. Alioto: No. We can make the point, I think.

By Mr. Alioto:

Q. These represent price offerings as distinguished from prices paid, do they not?

A. I had nothing to do with the construction of these.

Q. You are not sure of that. I think the record otherwise showed, but let me ask you this, then: So far as offered prices are concerned, you may have a deal in effect, for example, your 2.85 deal, as you have called it—you may have a deal in effect for a period of maybe 15 days?

A. Right.

[fol. 625] Q. That is correct, is it not?

A. Yes.

Q. And the purchases are all made during the 15-day low-priced period, after which your price list would be in effect, your offering price would be in effect?

A. That is right.

Q. That is correct, is it not?

A. Right.

Q. But that doesn't mean that anybody bought at that higher price?

A. No, not necessarily.

Q. For example, in the Safeway situation, Safeway bought all 15,000 pies during the pendency of the special price cut; that is correct, is it not?

A. That is right.

Q. And when the prices went up, or when that special price cut terminated and you were back again on your $4.00 price, Safeway didn't buy any pies at $4.00?

A. No.

Q. So prices paid in the market are a lot different than prices offered, aren't they?

A. I guess you would say they were.

Q. Okay.

A. I think that is true throughout the industry. Your coffee is on sale two days a week, and that's when the consumer buys the product.

Q. Actually, your company has the actual record of prices paid in all of these markets, as distinguished from prices offered, doesn't it?

A. I don't exactly know how to answer that. We have an invoice which is a price paid; we have an offering, which is a price list.

Q. You get a check from your customers, don't you? You know how much they paid?

A. Sure.

Q. Your records would show that?

A. Yes.

Q. And they are easily obtainable, are they not?

A. Well, the invoices are available.

Q. Now, then, so far as this chart is concerned, too—well, you said you didn't know anything about it, but I think you do know something about this: A while ago you said that there was a $1.15 price reduction available in Los Angeles, as well as in Salt Lake City, when this $2.85 price was in effect?

A. I believe on or about that date that was in effect in Los Angeles.

Q. You didn't have a temporary price decline or a temporary price cut in the Los Angeles area, did you, Mr. Halvarson, when you had that price cut in Salt Lake City?

A. It could have been a ppd or a billback.

Q. A billback is an advertising allowance, isn't it?

A. Yes.

Q. And an advertising allowance means that you got advertising value for that $1.15.

[fol. 626] A. Well, you got an ad for $1.15. They are both price cuts.

Q. You mean your advertising is a fiction?

A. No, it is not a fiction.

Q. It is real, isn't it?

A. One—I mentioned this yesterday, I think.

Q. Yes.

A. One demands performance and one comes off the face of the invoice.

Q. On one you get some advertising value, don't you?

A. Yes.

Q. This is the purpose of it.

A. Right.

Q. In Salt Lake City, however, that was a price cut that didn't demand anybody advertise anything, wasn't it?

A. A man with 15—whatever the cases were—15,000 or 10,000 cases of fruit pies would certainly advertise.

Q. But it is correct, is it not, that there is a difference between a price cut and an advertising allowance?

A. Technically, yes.

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[fol. 627] Q. Whether or not you make a profit or loss.

A. I don't know that. If I sell this much, and I sell this much more, I get a bonus.

Q. Regardless of whether the company or the division makes a profit or a loss.

A. Apparently so.

Mr. Alioto: We have no further questions.

Redirect examination.

By Mr. Schafer:

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By Mr. Schafer:

Q. Now, Mr. Halvarson, in respect to tracing out invoices to show your actual selling prices, I believe I am correct in understanding that where you have a billback you don't show that on the face of the invoice, is that correct?

A. No.

The Court: What difference does it make whether you show it on the face of the invoice or not. A billback means you got some value for what you paid.

Mr. Schafer: I would like to establish briefly, your Honor, that there is no way of tracing back to actual invoices what the billback in fact was. You just can't do it. You just can't look at these credit memos and put them back in again, actual selling invoices.

The Court: Well, that seems to me a funny way for a big company like this to keep its records.

Mr. Schafer: There is just no way of doing it. That is all there is to it. There is just no way of doing it.

The Court: It seems to me—it seems to me that the company would want to know what the billbacks were.

Mr. Schafer: They know what their billbacks are. There's no question about that.

The Court: And what they got for it.

By Mr. Schafer:

Q. Could you explain briefly, Mr. Halvarson, how the billback payment operates in the Los Angeles market?

The Court: Now, do you know, Mr. Halvarson?

The Witness: Yes, I do, sir.

[fol. 628] The Court: Well, fine. You tell us, then.

The Witness: We offer a billback at, say, arbitrarily, one dollar a case on a particular product, and the customer is a direct buying customer, and he buys a thousand cases of product, and he runs an ad on this product and he receives either a credit, if he prefers that, or a check, for a thousand dollars, if it was one dollar a case on a thousand cases.

Now, let's turn it around to an area where you could possibly follow me, to a wholesale jobber, Associated Grocers or Associated Food Stores, in this market. He does not receive this money because he does not advertise the product. This is unfair because Associated here runs their own ads, but take Certified Grocers in Los Angeles, which is the counterpart of this. The wholesale, or co-op or distributor per se does not run any ads. He distributes product to the members in that operation, and we pay the members. So that if he buys, the co-op buys, a thousand cases and he makes a thousand deliveries or 800 deliveries or 700 deliveries, we pay directly to those accounts that advertise within his group.

Now, the recapitulation. On our billbacks we recapitulate and do not exceed the thousand cases that he bought and, undoubtedly, will not pay up to that thousand cases because many of his members do not advertise and do not participate.

That is about the clearest explanation I can make of it.

By Mr. Schafer:

Q. In some cases your sales go directly to a distributor, but your advertising payments go directly to the distributor's customers, is that correct?

A. Yes. And there would be no way, no exact way, that you could trace to the jobber's invoice where he was billed for the thousand cases of product. It would be very difficult to trace out in all the directions that the money was paid. It would be ten dollars here and five dollars here.

The Court: Your company keeps a record of the people it pays money to, doesn't it?

The Witness: Oh, yes.

Mr. Schafer: But there is no question—

[fol. 629] The Court: I think I understand it. The company keeps records of the people it pays money to.

Mr. Schafer: Yes, but it doesn't keep records as to particular selling invoices.

The Court: And I suppose the records will show what is paid for, is that right?

The Witness: Yes.

Mr. Schafer: Yes. But not as against any particular sales invoice.

Mr. Alioto: That is not true. Go ahead.

Mr. Schafer: I don't know how you can know more about it than Mr. Halvarson, Mr. Alioto.

Mr. Alioto: He just said it. If you would listen to his testimony, you would know.

Mr. Schafer: Well, I am afraid I would not.

By Mr. Schafer:

Q. How long have you had this $1.15 billback in the Los Angeles market?

A. How long did I have it, or how long have I had it?

Q. Yes, how long have you had it?

A. I don't know. I would have to check the records on it.

Q. You don't recall when you started?

A. Not exact date, no.

Q. Was it through most of 1961 that you had it?

A. Yes. It was in a good portion of 1961.

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Recross examination.

By Mr. Alioto:

Q. Is your bookkeeping so loose that you can sell 1,000 cases to United Grocers, for example, and you could get requests for billbacks for 5,000 cases?

A. No.

Q. Of course not. Your records would show—you would have some kind of recapitulation record, I take it, that would show that you are not paying for more cases than you actually invoiced to United Grocers.

[fol. 630] A. Yes, because they identify on each delivery how much product was delivered to their members.

Q. So you have books and records that will show exactly how much you got from everybody, wouldn't you?

A. I don't personally, no.

Q. I mean your company.

A. Yes, I assume.

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Redirect examination.

By Mr. Schafer:

Q. Is there any way, Mr. Halvarson, of charging in a market a higher price than in fact you are offering publicly?

The Court: I think you have pursued that as far as you ought to.

Mr. Schafer: It is a yes-or-no question. Could he answer it yes or no?

The Court: Yes.

A. No.

The Court: All right, that was—

Mr. Schafer: Simple.

The Court: Thrifty.

Mr. Schafer: Thrifty.

LEONARD HENZKE, called as a witness on behalf of the defendant Continental, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schafer:

Q. Would you state your name, please, Mr. Henzke.
A. Leonard Henzke.
Q. And your business address?
A. 154 South First West, Salt Lake.
Q. And what is your employment, please, sir?
A. Grocery Merchandising Manager, Safeway Stores.
Q. In that position, Mr. Henzke, do you operate as a buyer of frozen food products for Safeway Stores?
A. Yes.
Q. Now, Mr. Henzke, would you describe for us generally the market as you see it from the buyer's side here in Salt Lake City. What are the brands that are competing for the business.
A. On pies?
Q. We are talking of frozen fruit pies.
A. Well, Utah Pie, Swiss Miss, Morton's, Stokeley's, as far as the pies we handle.
[fol. 631] Q. Let me caution you, sir, that we are speaking mostly of 1961, in that area, if you can, during our interrogation.
A. Well, it would be Bel Air—at that time Bel Air, Utah, and Morton.
Q. Was Simple Simon not in the market in 1961?
A. Well, we did have theirs in the cream pies, but—
Q. I was thinking, sir, not only of the pies that you were purchasing, but of the pies generally being offered in the market.
A. Oh, yes, in the market, Simple Simon.
Q. Who else?
A. Well, of course, Frost 'N' Flame, Pet-Ritz. That is about all I can remember, since I have been here.

Q. Okay. Could you describe for us what you consider to be the Salt Lake City market, sir, in geographical terms I am talking about.

A. Well, so far as—we consider our Salt Lake advertising area: Ogden, Provo, and Salt Lake. However, we do operate stores out of this office, one in Ontario, Oregon; one in Idaho; Wyoming; Nevada.

Q. Do you include Seattle in your description of the Salt Lake City market?

A. No.

Q. Or Intermountain area?

A. We have a division there. However, that is another division.

Q. Now, in defining an Intermountain market, or a Salt Lake City market, do you include Denver?

A. No.

Q. Or Spokane?

A. Not as far as we are concerned.

Q. Spokane?

A. No.

Q. Now, as a buyer, Mr. Henzke, are you prepared to pay a higher price for a pie that is of lesser weight?

Mr. Alioto: If your Honor please, I submit—

A. No.

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[fol. 632] By Mr. Schafer:

Q. As a buyer, Mr. Henzke, are you prepared to pay as much or more for a pie that is of lesser weight than another pie?

A. No.

Q. If you have a lighter weight pie, do you insist upon paying a lower price for that pie?

A. We figure out the ounces and see if the price is in line.

Q. What do you mean by "in line," sir?

A. In other words, we're not buying a smaller pie and paying a higher price per ounces. We have to do that to protect the customers.

The Court: You do that to stay in business, too, don't you? The customers wouldn't buy, if you pulled that stunt on them?

The Witness: Correct.

By Mr. Schafer:

Q. Now, am I correct, sir, Morton is a 22-ounce pie?

A. Right.

Q. Frost 'N' Flame is a 24-ounce pie, do you know?

A. Yes.

Q. In your judgment, then, Morton in order to be competitive with Frost 'N' Flame, does it have to price lower than Frost 'N' Flame?

A. Yes.

Q. In your judgment, Mr. Henzke, does the Utah Pie Company have some significant competitive advantages over the Morton Company in competing for the business in the Salt Lake City market?

A. They are a local concern, yes. We certainly would favor them if everything was equal.

Q. Why would you favor them?

A. They're local. The pie is known. They have the Utah name on their pie. And I think that's an advantage.

Q. And does their being local give them an advantage in terms of quantities of shipments to, say, Safeway?

A. Well, that does help us out, yes, sir.

Q. Is Safeway limited in its storage facilities?

A. We have very small storage facilities on frozen foods.

Q. Am I correct in understanding that you can get the best price that Utah Pie Company offers on its pies, no matter what quantity you receive at one time?

[fol. 633] A. Well, they have—they like for us to order

at least 500 cases to make it worthwhile, you know, to deliver.

Q. 500 cases. And you get their best price at 500 cases?

A. Well, I don't say it's the best price, but, I mean, they like to deliver that quantity. Smaller quantities would be inconvenient.

Q. And when you purchase—excuse me—did you purchase the Morton pies, sir, in June of 1961?

A. Yes.

Q. And am I correct in understanding that in order to get the lowest price that Morton quoted, you had to buy in truckload quantities?

A. That's correct.

Q. In entire truckload quantities?

A. Yes.

Q. Does that create any storage problems for the Safeway organization in Salt Lake City?

A. Yes.

Q. When you bought the Morton pies, Mr. Henzke, did that have any effect on your purchases of the Utah pies in June of 1961?

A. Well, indirectly it would. It would have an effect on all of our pies.

Q. What are all of your pies?

A. Bel Air and Swiss Miss, because of the space problem. We can only stock so many pies in our frozen food cases.

Q. Uh huh. And what were you buying in June of 1961, do you recall?

A. Let's see, Bel Air and Swiss Miss.

Q. And how long did these Morton pies last you, Mr. Henzke?

A. Well, actually, we made a distribution of the larger part of the shipment, and a few straggled along there. I think we had them about three weeks in the warehouse.

Q. Three weeks?

A. About three weeks, I think.

Q. Does that mean within three weeks you were out in the market again buying pies?

A. Well, let's see. As I recall, we bought two shipments. I don't know just what the dates were in between, but we ran out of the first shipment, and then went into the second shipment.

Q. Yes.

A. And that was distributed right out within a couple of weeks period.

Q. Am I correct in understanding that in three or so weeks you were back in the market for other pies?

A. Yes.

Q. Can you tell me, sir, whether or not in your judgment retail advertising is important to the manufacturers and to the retail stores in terms of securing volume pie sales?

A. Oh, yes. It certainly is.

Q. Can you get good volume without retail advertising?

[fol. 634] A. Well, there's a psychological effect from our store people. And, of course, the customer—naturally, we want to put the best values we have. And if that happens to be one of the better values, it certainly does help.

Q. Do the various manufacturers in this industry come to you as a buyer, Mr. Henzke, with various promotional offers or temporary price declines?

A. Yes, to me, and to my assistant, Mr. Walsh.

Q. Is that the way the competition operates in the market?

A. Yes.

Q. These short term price concessions, if you will?

A. Yes.

Q. And if you get a good price, am I correct in my understanding that you advertise the product in your retail advertising?

A. Well, if it's the right type of an item, that is, we think we're going to get a good volume on it, we naturally try to work it in with our ads.

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[fol. 635] (The exhibits marked Morton's Exhibits No. M-42, M-43, M-44, M-45, M-46, M-47 for identification were received in evidence.)

Mr. Schafer: I just want to show the jury briefly the pattern of advertising by Safeway in the month of June, 1961. Here is the Safeway ad of June 2, 1961, and there you'll see Safeway's advertising the Swiss Miss pie, 20-ounce pie, 29 cents. And the next ad we have is Morton's Exhibit 47, which is dated June 23, 1961, and someplace here is an ad—oh, here it is, Swiss Miss advertising here, again, of 29 cents.

And here fs an ad dated June 29, 1961, Morton's Exhibit 43, again Safeway advertisement.

And here is the first advertisement of a Morton pie, and that's a three for 79 cents.

And then, the next Safeway advertisement we have is Morton's Exhibit 42, which shows—here it is—the Morton advertisement of four for a dollar on July 21, 1961. Four for a dollar. Retail price on the Morton frozen pies.

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By Mr. Schafer:

Q. Is this the kind of advertising that qualifies, Mr. Henzke, for the billbacks or advertising payments that are offered by the manufacturers?

A. Well, every manufacturer would love to see his product in there. Of course, we can only advertise so many items.

Q. That's right. But am I correct in saying that this is the kind of advertising that the manufacturer seeks to get—that he pays for when he's making a promotional allowance to the trade?

A. Yes.

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[fol. 636] By Mr. Schafer:

Q. The fact of the matter is, there was no advertising allowance available, and yet you advertised the Morton pies; is that correct?

A. Yes.

Q. How do you handle, Mr. Henzke, the Bel Air brands? Do you buy regularly certain set quantities of that in the Safeway Division of Salt Lake City?

A. Yes, we have shipments coming in every week.

Q. Do you handle the buying considerations of that brand as you handle the buying considerations of the other brands that are offered to you?

A. I don't quite understand.

Q. Well, my question is whether or not you from time to time cease buying, say, the Bel Air brand if an advertised brand comes to you with a better offer?

A. Well, we do that, yes.

Q. So that your purchase—

A. We have no obligation to buy Bel Air brand.

Q. So that your purchases of Bel Air brand can be affected by competitive activity in the market place of the other advertised brands?

A. That's right.

Q. Do you know whether or not you bought more apple pies from the Utah Pie Company in 1961 than you did in 1960?

A. As I recall, I believe we did. Frozen pies are increasing every year. Let's see, in '62 did you say?

Q. '61, I said, as against 1960.

A. Yes.

Q. How was the picture in 1962?

A. It was high, also.

Q. Do you remember how much higher?

A. No, I don't recall offhand. I know—let's see, '62, I believe, was—when Utah lowered their price, we bought a considerable quantity in the first quarter.

Q. Do your remember how much?
A. Of '62.

Mr. Alioto: What year is this?
[fol. 637] Mr. Schafer: '62. First quarter of '62.
The Witness: It was up over 20,000 cases, I know.

By Mr. Schafer:

Q. You say Utah Pie lowered its price?
A. Yes.
Q. What did they lower the price to?
A. $2.75, I believe it was.
Q. Was it $2.75 in 1962?
A. When was the price of this Morton? Was that '61?
Q. That was in June of '61.
A. Well, that's '61 they lowered it, then.
Q. What's their price in 1962?
A. Well, let's see—

The Court: That question has been asked and answered.
Mr. Schafer: He just said $2.90.
The Court: He said $2.75.
Mr. Schafer: Well, he was confused as to the year, your Honor.
The Court: All right.
The Witness: I'm not exactly positive on that, but I'm pretty sure it's $2.90.

By Mr. Schafer:

Q. Do you know of any reason why the Utah Pie Company would have lowered its price to $2.90 in terms of competitive activity in the market place?

The Court: That's asking this witness to tell you what was in the minds of the Utah Pie managers.
Mr. Schafer: Let me try it again another way, your Honor.
The Court: All right.

By Mr. Schafer:

Q. Do you know whether or not any other manufacturer of pies had a price as low as $2.90 in the year 1962?

A. No.

Q. Do you know in terms of just the competitive activity, Mr. Henzke, do you know of any reason why a $2.90 price was necessary in 1962?

[fol. 638] Mr. Alioto: If your Honor please, first of all we're talking about a period of time after the filing of the complaint; and, secondly, it calls for the opinion and conclusion of this witness of a matter on which he's not competent.

The Court: It seems to me it's opinion and conclusion, certainly. The objection is sustained.

Mr. Schafer: He has such great familiarity with the market, your Honor, I thought I could ask him that question.

By Mr. Schafer:

Q. Let me show you Morton's Exhibits 48 and 49 for identification, Mr. Henzke, and can you state to me what those are?

A. Well, these are invoices for two truckloads of pies.

Q. And what is the reading under f.o.b.?

A. Prepaid. Or, "Ppd.," is supposedly "prepaid." However, these weren't prepaid.

Q. Did Safeway pay the freight on those?

A. Yes.

Mr. Schafer: I have no further questions—oh, excuse me. I do have.

By Mr. Schafer:

Q. There's some ambiguity perhaps in your question and answer, Mr. Henzke. I asked you whether or not you knew whether there was any other competitive price that would have required a $2.90 price; and you kindly said you didn't

know. And the ambiguity may be—is it a failure of knowledge, or is it a fact that there was no competitive activity that required to your knowledge a $2.90 price?

A. I'm not sure that there was—wasn't.

Q. You don't know of any?

A. No.

Q. That's your testimony?

A. Uh huh.

Q. Are you, Mr. Henzke, in charge of the buying decisions on frozen pies for the Salt Lake City Division of Safeway?

A. Well, we—

Q. Do you—

A. No, not as a person myself. We present these items to a committee. Usually there is district managers, store managers, staff.

Q. Is the committee made up of the Salt Lake City Division personnel?

A. Yes.

Q. And it's not necessary to consult the San Francisco headquarters office in terms of buying decisions; is that correct?

A. No.

[fol. 639] Q. Is that correct? Mr. Henzke, you testified that you didn't purchase any Simple Simon pies in 1961; and I ask you whether or not it isn't a fact that Simple Simon tried to sell you pies in 1961?

A. Well, they've been in off and on with offerings, yes.

Q. Yes.

A. I'll qualify that. We may have had some cream pies in.

Q. We're talking of fruit pies, sir.

A. Yes.

Mr. Schafer: No further questions, your Honor.

Cross examination.

By Mr. Alioto:

Q. Mr. Henzke, you were first interrogated about the importance of ounces in pies, whether or not a 22-ounce should sell for less than a 24-ounce, or otherwise. Now, the fact of the matter remains, though, doesn't it, Mr. Henzke, that you yourself, the Safeway organization, has during the—during approximately the same period received more money for a lighter pie? Isn't that true?

A. Received more money for a lighter pie?

Q. For a pie with fewer ounces in it.

A. Retail, you mean?

Q. Yes.

A. Well, Swiss Miss, yes.

Q. Surely. And these ads show it, don't they?

A. Well, of course, their price—that was the cheapest price at the time.

Q. You mean the Swiss Miss price of the Pet Company was the cheapest price at the time? Is that it?

A. Before this Morton deal.

Q. In other words, before Morton came along with its price in June of 19—

A. However it was—

Q. Excuse me, Mr. Henzke. I want to understand your testimony. The cheapest price before this one was the Swiss Miss price of the Pet Company; is that correct?

A. In dollars and cents, yes.

Q. Yes. Thank you. Now then, let's take a look at the effective ounces on sales prices. Let's take these in the order in which they were put in. On 42, would you help me find the—here we have now—we have a Morton pie, four for a dollar. That's 25 cents a pie for a 22-ounce pie; is that correct?

A. Uh huh.

Q. Now, let's take the Swiss Miss.

A. There we have it.

Q. Now, here's your Swiss Miss price on apple, cherry, and boysenberry. That's a 20-ounce pie?

A. 20-ounce.

Q. It's a smaller pie than the Morton pie, isn't it? Is that correct?

A. Right.

Q. But on this one you got 29 cents? That's correct, is it not?

A. Right.

[fol. 640] Q. So it is true that regardless of the number of ounces, you can get a higher price for fewer ounces or a lower price for more ounces sometimes, and you have gotten it, haven't you?

A. Well, depending on the market, yes.

Q. Surely. Now, as a matter of fact, I take it you would agree with us, Mr. Henzke—were you in court this morning, incidentally?

A. No, I just came in.

Q. You would agree with me, I take it, that it would be pretty hard for the housewife to tell the difference between a 24-ounce and a 22-ounce pie, those two levels?

A. Well, I think they tell the difference.

Q. You think they tell the difference?

A. I think they can, yes. At least, from our sales standpoint, we feel that for a good pie there should be a 24—enough fruit in there to make 24 ounces.

Q. Well—

A. And we take that into consideration.

Q. Well, why is it, then, you can get four cents a pie more for a 20-ounce pie, as you did on this occasion?

A. Of course, that's a different date.

Q. Oh, yes. But there would have been—

A. And the only reason we had four for a dollar was the competition came out four for a dollar. Otherwise we would have kept them three for 79.

Q. June 29. These dates are June 29, 1961, June 23, 1961, July 21, 1961, and June 2 of 1961. Now, Mr. Henzke, let me understand who actually has the buying authority for your

organization here in Salt Lake City. You mentioned some committee. Is this committee the final word on what shall be bought in Salt Lake City?

A. On a new item, yes. I mean, in other words, no new item is bought unless this committee passes on it.

Q. And how large is this committee?

A. Oh, we usually have three or four district managers, a couple of store managers—five—ten people.

Q. And Mr. Young, I take it, has nothing to do with that committee?

A. No.

Q. Now, that committee, however, has nothing to do with the purchase of Bel Air pie, does it?

A. As a new item, you mean?

Q. Well, there's some evidence here, for example, that a contract was made on a national basis between Safeway Stores and the Pet Milk Company, on Bel Air pies.

A. We have nothing to do with that part of it.

Q. You have nothing at all to do with that?

A. No.

Q. That was all handled by Mr. Alan Young, wasn't it? Now, it is also a fact that Mr. Young can authorize the purchase by Safeway in this area of Utah pies, even though your local division may be against it?

A. Yes. That could be possible.

[fol. 641] Q. On pumpkin and mince?

A. Uh huh.

Q. Is that correct?

A. Right.

Q. Well then, what is the jurisdictional break? I don't understand that.

A. Well, this is a separate division of our company, the frozen food section.

Q. Yes.

A. Who are supposed to be experts on what goes into a pie and so on. And they work out that program. Now, on this pumpkin and mince, I gather you're talking about what? '61, was it, or—there was one season there where Utah did make our Bel Air pumpkin and mince.

Q. Where it did make it?

A. Yes.

Q. Uh huh. And that was ordered by Mr. Young over your local opposition, was it?

A. Oh, no. There was correspondence between us on it. And, in fact, we favored having Utah make them here, and apparently they worked out the deal.

Q. Well, why was that worked out with Mr. Young instead of with you? Now, are we talking about the Bel Air?

A. I wouldn't be familiar with the—in other words, the Bel Air label as such is controlled through California.

Q. Well, would it be correct to say, then, that on everything except Bel Air, the jurisdiction is here locally?

A. No. That was an unusual circumstance on the—because of the local conditions here on those two pies.

Q. Well, were those two pies under the Bel Air label?

A. Yes.

Q. All right. Now, you have purchased pies, I take it, under the Utah label, haven't you?

A. Right.

Q. And that purchase is determined here locally, rather than with Mr. Young?

A. That's right.

Q. Now, it is a fact, however, is it not, that Mr. Young has attempted to encourage you to stop Pet-Ritz flavors of 8-inch fruit pies that are packed under the Bel Air label?

A. 8-inch fruit pies? I'm not even familiar that we have any under the Bel Air label.

Q. Well, has Mr. Young ever encouraged you to substitute the Pet-Ritz business for the competing—for the competing pies—other than where you're dealing on Bel Air?

A. No, not as an encouragement. These pies come from Pet-Ritz; and as far as weight problem is concerned, it would be a lot easier to handle Pet-Ritz. But, then, we're not obligated to do that.

Q. Let me read this section of a document in evidence and ask you what if anything you know about it. Exhibit 47 in this case purports to be an interoffice memorandum of

[fol. 642] the Pet Company, and it purports to set forth a meeting between Alan Young, Boyd Schenk, and a man who is identified by no more than "me." Alan Young, Bill Schenk, and "me." First of all, do you know Boyd Schenk?

A. No.

Q. You do, of course, know Alan Young?

A. Yes.

Q. And he's your buyer in Safeway. Now, part of it reads as follows:

"Detailed discussion was had with Young on the need to develop better cooperation between the Safeway sales divisions and the Pet-Ritz sales force in stocking Pet-Ritz pies. Young agreed to write a letter to each of the Safeway divisions, requesting help in our behalf, reemphasizing the advantages and freight savings by pooling Pet-Ritz with Bel Air brand. In other words, Young will act as our door opener for our sales people, particularly in the case of 9-inch fruits, creams, custards, and 8-inch fruit flavors not produced under the Safeway Bel Air label.

"In addition, Young will encourage the Safeway sales division to stock Pet-Ritz flavors of 8-inch fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz, both in quality and price.

"Young will send me a blind copy of that letter that goes to each Safeway division, with the understanding that our men are not to quote this letter.

"Schenk will advise as to the sizes and/or flavors by Safeway sales divisions on which we need support."

Now, this is dated July 14 of 1959.

Q. Did you have any discussions with Mr. Young or did you receive any correspondence—

A. I have only been here—

Q. (Continuing) —from him?

A. No. I have only been here two and a half years.

Q. You were not there at this period of time?

A. No. However, I would say that is wishful thinking on the part of the Pet-Ritz Company. That would be a nice setup if they could get that worked out.

Q. You mean it is wishful thinking of the Pet-Ritz Company?

A. Mr. Young—

Q. You mean Mr. Young would make a commitment to them that he wouldn't keep?

[fol. 643] A. Mr. Young would have no authority on what pies we buy here. We would discontinue Bel Air pies as easily as we discontinue any other pie.

Q. I understand that.

A. And we have, in fact. In fact, we don't handle all Bel Air pies here now. So if that letter was written, he is trying to get a deal worked through—or, it would be nice if he could get it.

• • • • • • •

Q. And I take it you believe that if he made a commitment to somebody that he would keep it.

A. But he has no right to make a commitment for a division.

• • • • • • •

[fol. 644] Q. The last thing you were interrogated on was certain invoices. In your June of 1961, June of 1961, orders from the Morton Company, you recall that Safeway picked up some of those pies at the Watsonville plant, not Continental, but it belongs to somebody else, but they pack for Continental. Do you recall that?

A. It wasn't our trucker. There was a trucker who picked them up, yes.

Q. It was a trucker who picked them up. Did you know approximately what freight was paid by Safeway in connection with the pies that were picked up in Watsonville and transported here?

A. I wouldn't know.

• • • • • • •

Redirect examination.

By Mr. Schafer:

Q. Mr. Henzke, you said that in 1961 that the cheapest pie was the Swiss Miss. Now, do you mean by that that the cheapest pie which was offered to you was the Swiss Miss pie, or the cheapest pie anyplace in the market was the Swiss Miss pie?

A. It was offered to us. If there were others, I surely didn't know about them.

Q. You said that the competition came out at four for a dollar retail in June of 1961 before you did, is that correct?

A. Yes.

Q. What competition did you mean by that?

A. I believe it was—well, there were several. I think it was IGA, Grand American. We had three for 79, and we thought that price would hold. And the next week Utah pies came out four for a dollar.

Q. You had three for 79 on the Morton pies?

A. Yes.

Q. And the next week, after you advertised three for 79 on Morton, the Utah pies were advertised four for a dollar, is that correct?

A. And we met them, yes.

Q. And you met them subsequently?

A. Yes.

Q. So that you advertised four for a dollar on Morton after the Utah pies were advertised four for a dollar?

A. Correct.

[fol. 645] Q. In your judgment, Mr. Henzke, as a buyer, is a 2.75 price on a 24-ounce pie a better price in terms of a buyer than a 2.85 price on a 22-ounce pie?

A. We think the price is all right. We are buying the pies.

Q. My question to you, sir, is whether or not a lower price, in terms of dollars, on a heavier pie is a better price.

A. Yes.

* * * * * * *

[fol. 647] ELMER DEGENHARDT, called as a witness on behalf of defendant Continental, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schafer:

Q. Would you state your name, please, sir.

A. Elmer Degenhardt.

Q. What is your address?

A. 101-23rd Street, Ogden.

Q. And what is your—you can sit down, sir. What is your occupation?

A. I am the buyer and merchandising manager for Grand American Markets, which includes American Food, Grand American, and Grand Central Grocery.

Q. And how long, Mr. Degenhardt, have you been in that position?

A. Well, I was in that position with American Food Stores for—since '59, and in that position with—since we merged with Grand Central into one division—since last, just about a year ago.

Q. So that you have been a buyer of frozen foods in the market since 1959?

A. Yes.

Q. Can you describe for us generally, sir, during that period of time the names of the various brands that have competed in this market?

A. We have had Libby—in our—as our competitors with other companies?

Q. I am talking about the manufacturers, sellers.

A. Libby, Pet-Ritz, Simple Simon, Johnston has presented pies, Mary Elizabeth label, Bel Air, Mayfresh, Morton. That is the main—

Q. Can you tell us how these manufacturers compete for the business?

A. Deals.

Q. What do you mean by "deals"?

A. Whoever has the best price and the best promotional allowance, advertising allowance, or what have you, is the determining factor on pie purchases.

Q. And when a promotional allowance is offered by a manufacturer, for how long a period of time is that normally offered?

A. It varies anywhere from 14 days on into months.

Q. When a manufacturer offers a promotional allowance, is it normal for all the other manufacturers to immediately drop their price to meet that promotional allowance?

A. Sometimes, yes.

Q. But not always, is that correct?

A. Not always.

Q. Sometimes do they elect to ride it out and not make any concessions?

Mr. Alioto: If your Honor please, what manufacturers do you can get from a manufacturer, not from a man who is not a manufacturer.

[fol. 648] Mr. Schafer: Just external evidence of what the manufacturers are quoting to him as a price.

Mr. Alioto: He is talking about a manufacturer's frame of mind in the questions up to now.

Mr. Schafer: No, I am not. I am talking about whether or not they drop their price to meet the promotional allowance of any other manufacturer.

Mr. Alioto: Whether or not they dropped their price to meet a promotional allowance is something in the manufacturer's mind. We object to it on that ground. This man has no evidence of that.

The Court: It is a conclusion. Sustained.

By Mr. Schafer:

Q. When a promotional allowance is offered, Mr. Degenhardt, for a period of time, two weeks, whatever it is, do prices drop in the market?

A. Retail prices?

Q. No. I am talking about manufacturers' prices, other manfacturers' prices, do they drop?

A. Sometimes they do.

Q. And sometimes—

A. Sometimes they don't.

Q. Would you describe for us, Mr. Degenhardt, in geographical area, what you call the Salt Lake City market or the Intermountain trading area, whatever terminology you want to use.

A. I consider the Intermountain trading area, Salt Lake City trading area, as Utah, the western fringes of Colorado, southwestern Wyoming, southern Idaho up to north of Boise, touching on Ontario, Oregon, and eastern Nevada.

Q. Can you tell us, sir, how you make that definition. How do you arrive at those conclusions?

A. Well, that is determined by where another major trading area meets the Salt Lake trading area. In, example, Denver, where Denver and Salt Lake trading areas meet in western Colorado; the Phoenix trading area meets at southern Utah; Portland area will meet in eastern Oregon; and the San Francisco area would come into Reno area; and Los Angeles would come in as far as Las Vegas.

Q. And is the Denver area a separate trading area?

A. Yes.

Mr. Alioto: If your Honor please, for what, steel, aluminum, or for—

Mr. Schafer: Fruit pies, frozen fruit pies.

[fol. 649] Mr. Alioto: Trading area in the sense of where plants are located? I don't understand.

By Mr. Schafer:

Q. In competitive terms, is the trading area a separate, definable market, in your judgment as a buyer in the market?

A. Yes.

Q. And would the same thing be true of the Portland area?

A. Yes.

Q. And the San Francisco area?

A. Yes.

Q. And the Seattle area?

A. Yes.

Q. And of the Phoenix area?

A. Yes.

Q. Now, Mr. Degenhardt, do you, as a buyer, expect and insist upon paying less for a lighter pie?

A. You mean, in other words, will I pay more for a lighter pie than I will a heavier one?

Q. Yes.

A. No.

Q. Do you insist upon paying lower, then?

A. Yes.

Q. By about how much? Do you have any measure of how you expect to pay less for a lighter pie?

A. Based on the current market, a 24-ounce pie is worth—our cost is approximately a quarter, which is about a penny an ounce, and we would expect to pay equivalently less for that many ounces less.

Q. Taking, sir a 24-ounce pie offered at $3.10 and a 22-ounce pie offered at $2.85, in your judgment as a buyer is the 2.85 price equally as low as the 3.10 price?

A. It would be pretty close. It would be approximately the same value.

Q. Now, how about advertising in this market, Mr. Degenhardt, is that important?

A. We consider it the life blood of our business, is the advertising.

Q. Do the manufacturers that compete for your business try to get you to advertise their products?

A. Yes.

Q. How do they do that?

A. Well, at a buying interview that is the basis of presenting an item, is to get us to advertise it.

Q. And how do they seek to induce you to advertise it?

A. Oh, various and sundry ways. Promotional allowances, advertising allowances, whether or not it is of value to the consumer. Some of them use a straight sales pitch. Others have various allowances, advertising, promotional.

Q. How about a straight price reduction? Do you advertise pies at retail when you have a straight price reduction which gives a good retail price?

A. Yes, we do.

[fol. 650] Q. Now, the Utah Pie Company, sir, focusing on that for the moment—in your judgment does the Utah Pie Company have any significant competitive advantages over the Morton Company in competing for the business in the Salt Lake City market?

A. They are a local concern. We favor local industry.

Q. Why do you favor local concerns?

A. Oh, it is easier. Shipping arrangements are easier. If it is local, the product is more readily available. Well, it is just good business to favor local people.

Q. What do you mean "the product is more readily available"?

A. Well, their plant is here. It is the only pie plant here. It is accessible to our pickup.

Q. What quantities of shipments do you take your product in from the Utah Pie Company?

A. It varies, anywhere from 50 cases to a thousand.

Q. *Do* don't buy in truck load quantities from the Utah Pie Company?

A. No.

Q. Is that correct?

A. No.

Q. Am I correct in understanding, sir, that that is a significant advantage for you as a buyer in being able to take smaller quantities of purchases?

A. Yes, it is.

Q. What advantages are those?

A. Storage space. Frozen food space is extremely expensive, warehouse storage.

Q. In view of the Utah Pie Company's various advantages that you have identified, Mr. Degenhardt, if two pies were priced at $3.00, one from the Utah Pie Company and one from an out-of-the-market manufacturer of a lighter weight pie, which pie would you elect to buy?

A. Assuming the quality was the same, I would buy the Utah pie.

Q. All right. I did assume the quality being identical. Now, are you purchasing from the Utah Pie Company now, Mr. Degenhardt?

A. Yes, we are.

Q. Is that the Utah Pie label, or what?

A. We carry the Utah Pie label, but primarily our purchases are under the Mayfresh label, which is our own controlled label.

Q. The Utah Pie Company, do they manufacture the Mayfresh label?

A. Yes.

Q. When did you start purchasing the Mayfresh label?

The Court: What has that got to do with the period in question in this lawsuit?

[fol. 651] Mr. Schafer: I think it is in 1961 that he did, sir.

The Court: I don't know whether he is talking about 1961 or the present.

By Mr. Schafer:

Q. Did you in 1961, sir, start purchasing the Mayfresh label?

A. Yes.

Q. And what brands were you purchasing before you started purchasing the Mayfresh label?

A. We were purchasing Libby and Morton's.

Q. And have you purchased Morton's since you started purchasing the Mayfresh label?

A. No. We broke it off about the time we put the Mayfresh label in. We discontinued the Morton label.

Q. As a buyer, Mr. Degenhardt, are you willing to advertise a manufacturer's pie at a price higher than you know one of your retail competitors is advertising another manufacturer's pie?

A. No. You have got to be competitive.

Q. Am I correct in understanding that in order for a manufacturer to get your advertising support, he has got to offer you a price which permits you to quote a retail price which is equally as low as your retail competitors have?

A. Yes.

Q. In connection with your Mayfresh, Mr. Degenhardt, we have had a good deal of testimony as to other private label brands in the market. I wonder if you can tell us whether or not, in your judgment, the introduction of private label brands in this market has had any significant effect upon the market, on the price structure of the market, I should say?

A. Well, generally speaking, private label are bought on an over-all basis for a price. I would say that private label has forced the retail price down somewhat.

Q. Would you say that it has forced the sellers—the manufacturer's price down?

A. Well, if he is going to be competitive, yes. He had to be competitive with private label.

Q. It is normal, is it not, Mr. Degenhardt, for private label pies to be priced at a lower price than would otherwise be normal for the advertised brands?

A. Normally, yes.

By Mr. Schafer:

Q. We were talking, Mr. Degenhardt, about retail advertising, and I believe you said that retail advertising was important to secure volume in the business. And I'm not sure whether or not I asked you whether or not in your view an advertising allowance offered by a manufacturer is the same thing as a temporary price reduction.

A. Major advertising allowance would be, what we would consider as a price reduction.

Q. What do you mean by "major"?

A. Anything over, in pie, I'd say anything over ten cents a dozen.

[fol. 652] Q. And do you handle an advertising allowance in the same fashion that you handle a temporary price reduction, in terms of how you price the product and whether or not you advertise the product?

A. On a major reduction, yes. A major price advertising—a major advertising allowance, yes.

Q. I take it something like $1.15 a dozen would be a major allowance?

A. Yes.

Q. How do you handle advertising as a retail organization, sir? How do you handle your retail advertising?

A. Just how do you—

Q. Well, do you run an ad every Thursday always, or do you just run ads every once in a while, or just how?

A. We run an ad every Thursday, 52 weeks a year.

The Court: I don't see how this advances the cause any.

Mr. Schafer: I just wanted to establish, your Honor—

The Court: Well, don't tell me what you want to establish. Can't we make a little headway?

By Mr. Schafer:

Q. Mr. Degenhardt, when you place an ad for, say, Morton pies or Utah pies or anybody's pies, when you carry that product in your advertisement, does that increase the cost of the advertising to you?

A. No. We contract X amount of space per week, and the case here, we run a double truck, which is two pages each week here, and also two pages in the Ogden paper.

Q. And you've got that space, and you allocate it among your various food products and brands; is that correct?

A. Yes.

Q. You've got the space anyway?

A. Yes.

Q. How are the payments which you receive from a manufacturer for advertising, how are they figured, the amount, how is the amount figured?

A. A major advertising—it's on a per case, per case basis.

Q. According to how much you purchase from the manufacturer?

A. Yes.

Q. It's not predicated upon how much it's cost you to advertise the produce?

A. Normally, no. There is—advertising allowance is sometimes based on what we call "national line rate." We accumulate, say, sometimes ten cents a dozen, which we can use up, but we cannot use over that.

[fol. 653] Q. In this line of interrogation I am thinking, sir, about temporary or two or three week—advertising allowances which the record shows are offered from time to time to the various manufacturers.

A. Oh, it's based strictly on purchases.

* * * * * * *

(The documents marked Defendant's Exhibits M-50 thru M-56 were thereupon received in evidence.)

By Mr. Schafer:

Q. Let me just show you these advertisements, Mr. Degenhardt, and just ask you to identify who the Grand Central Markets and the Grand American Markets are.

A. That is the organization with which I am affiliated.

Q. Are you these the types of advertising, Mr. Degenhardt, that we have just been talking about?

A. Yes.

Mr. Schafer: I would just like to show these briefly to the jury, your Honor.

This is the Grand Central advertisement Mr. Degenhardt has been talking about. The advertisement I am showing the jury now is Morton's Exhibit 50 in evidence, which shows an advertisement for the Utah apple pies at four for a dollar, the large 24-ounce size, and the record shows —this is on the June 30 date. This is one of the first ads at four for a dollar. For the first time, retail pies were advertised four for a dollar on June 30, 1961. And on this date the Safeway Stores were advertising Morton pies at three for 79 cents.

[fol. 654] This is the ad for June 30.

And then the ad for July 14, another Utah apple pie ad at four for a dollar, large 24-ounce size.

And then the next one is dated July 28, 1960, and again the Utah apple pie ad, large 24-ounce size at four for a dollar.

And then just the last one, August 25, Utah pie—or, the Mayfresh ad, Mayfresh label, the private label manufactured by the Utah Pie Company, advertised here at three for 95 cents, a large 24-ounce size.

By Mr. Schafer:

Q. In that connection, Mr. Degenhardt, counsel for plaintiff indicates there may have been some confusion this morning in the record as to when the Ogden Branch of this organization started buying the Mayfresh label.

A. Just about a year ago.

Q. That was in 1962?

A. About the first of the year, about the first of January.

Q. It was only the Salt Lake City part of the organization which was buying it in 1961, is that correct?

A. Correct.

Q. When, Mr. Degenhardt, a manufacturer comes to you with what we call an advertising allowance, do you compute how much it is going to cost you to run the ad?

A. No.

Q. Do you compute how much your price is?

A. We compute how much the product is going to cost us.

Q. After taking into account the advertising allowance?

A. If it is a major advertising—what we call a major advertising allowance, yes.

Q. I am talking now about what you call a major advertising allowance, something over 10 cents.

A. Yes.

Q. In that regard you compute what it is going to cost you in terms of a per dozen cost, is that right?

A. Yes.

Q. Now, Mr. Degenhardt, if I understood the testimony earlier in this trial, there was testimony that the plaintiff company does not offer a freight pickup allowance. And my question to you, sir, is: Is American Food Stores accorded a freight allowance by the Utah Pie Company?

A. Yes, on all items except what are billed as a net item.

Q. So that the product, the flavors—some flavors are billed as not net items, is that right?

A. Yes.

Q. And on these flavors you are given a freight allowance?

A. Yes.

[fol. 655] Q. Of what amount?

A. Ten cents a case.

Q. And that is 20 cents a dozen, or is that 10 cents a dozen?

A. No, 10 cents a dozen.

Q. Ten cents a dozen. And that is to take the product what, 40 miles, is it, to Ogden?

A. Yes.

Q. Do you also receive an advertising allowance from the Utah Pie Company on your purchases?

A. On all items except the net items.

Q. Now, Mr. Degenhardt, with respect to this private label business that we have seen evidence of in this trial, do you have an opinion as to what the effect has been on the market of the private label products?

A. It—private label has increased the—has made the market more competitive.

Q. What do you mean by being more competitive, sir?

A. Everybody is inclined to use his own pies and get the best price available on his own label.

Q. When you say "everybody" do you mean the retailers?

A. No. Each advertising group that is handling a private label pie. In other words, we feature our private label pies at a price competitive to anything else that we would feature, competitive or below.

Q. Would you say the effect of the introduction of the private label pies has been to decrease the general level, price level, in the market?

A. Yes.

Mr. Alioto: Now, if your Honor please, it seems to me this is a matter of proof and a matter of records, invoices that we already have in evidence. I don't think this witness is competent.

The Court: Read the question, Miss Reporter.

Mr. Schafer: It is a question, your Honor, of cause and effect.

The Court: Let me have the question read.

(Question read.)

The Court: Sustained.

By Mr. Schafer:

Q. Has there been a decline in the price level of the market, Mr. Degenhardt, as you have witnessed it?

[fol. 656] The Court: Same question.

Mr. Alioto: The price level is evidenced by the records here.

The Court: Same ruling.

By Mr. Schafer:

Q. In respect, Mr. Degenhardt, of the question I asked you this morning as to what the geographical area of the Salt Lake City, or Intermountain, trading area was, would you say that that market tends to be defined, in addition to the factors that you enumerated, also tends to be defined by the scope of the newspaper advertising?

A. Yes, I would say so.

Q. Could you explain why you have reached that conclusion?

A. The area covered by the two major Salt Lake City newspapers would define the trading area.

Q. Why would it define the trading area?

A. Advertising would cause it to do so, because as long as these newspapers are covering this area, products would have to be sold on an equal level within that area, on an equal basis.

Q. Sold by the retailers?

A. Yes.

Q. And would that have an effect upon the sales price of the manufacturers in the area?

A. Yes, I would say so.

Q. I would take it, sir, that papers from other cities are not used generally to advertise in this market?

A. No, only—no major cities, just the local papers that the Salt Lake papers already cover.

Q. Do you know, Mr. Degenhardt, of any price in the market that is as low as $2.90 a dozen on apple pies now?

Mr. Alioto: If your Honor please, we are supposed to have all of the prices in the market here.

Mr. Schafer: No, I don't think we are. We just have the prices according to this action.

Mr. Alioto: What date are you talking about?

Mr. Schafer: 1962.

Mr. Alioto: This is after the complaint.

Mr. Schafer: We have an issue here as to the substantial lessening of competition in this market. We have to know what the effects have been.

[fol. 657] The Court: Overruled.

A. Yes, sir, there is a $2.90 price on pies in the market.

By Mr. Schafer:

Q. Whose price is that?

A. The ones we are currently purchasing are from Utah Pie under our own label.

Q. Do you know of any price by any other manufacturer that is as low as that, Mr. Degenhardt?

A. Not that I know of. If there is, I haven't been presented with it recently.

Q. Now, Mr. Degenhardt, in respect to the June, 1961 transaction in which, as I understand it—well, the record shows that you purchased some pies from Morton in June of 1961. Do you recall receiving a telephone call from Mr. Chapman in respect to the purchase you made on or about June 20 of 1961?

A. I think I recall the instance you are referring to. It was when the pie market declined. Are you referring to the purchase order I had given—

Q. Yes, I am, sir.

A. Yes.

Q. Could you recount for us the substance of the telephone conversation you had with Mr. Chapman?

A. Yes. He called me and told me that Utah Pie—

Mr. Alioto: Excuse me, if your Honor please. A telephone conversation between a third party and this man

relating to Utah Pie, that Utah Pie wasn't a party to, is obviously hearsay. We object to it on that ground.

Mr. Schafer: It is not relating to Utah Pie.

Mr. Alioto: He started out by saying "Utah Pie." But, in any event, it is obvious hearsay, and we object to it on that ground.

The Court: Sustained.

By Mr. Schafer:

Q. Did you, Mr. Degenhardt, cancel your order for the Morton pie in June of 1961?

A. No.

Q. Were you given an opportunity to cancel your order for the Morton pie in 1961, June?

A. Yes.

Q. Now, Mr. Degenhardt, there has been—well, let me ask you in connection with your association with this market—or, let me clean up this detail first.

Mr. Schafer: I'm very sorry. Would you mark this, please.

[fol. 658] (Defendant Morton's Exhibits No. M-57 and M-58 were thereupon marked for identification.)

By Mr. Shafer:

Q. Let me show you Morton's Exhibit 57 and 58 for identification and ask you if you can identify these documents.

A. This is an invoice from Morton Pies to us.

Q. Would you tell us, sir, what the f.o.b. box indicates on the two documents, 57 and 58?

A. Well, it would indicate where the pies were—what was their delivered price, where they were to be delivered to.

Q. What does the "ppd" mean to you?

A. Prepaid.

Q. And were these shipments in fact prepaid by Morton?

A. No. Not on this price, they weren't. They were f.o.b. California, Watsonville.

Q. And your organization in fact paid the freight on those shipments, is that correct, sir?

A. Yes. Yes. Yes, we did.

Q. Thank you. Now, Mr. Degenhardt, in your judgment, do the private label pies that we've had testimony about, do they compete with the advertised brand pies?

A. Yes.

Q. Do you know of any reason, Mr. Degenhardt, for differentiating between the two in terms of the competitive interplay between the two types of product?

Mr. Alioto: If your Honor please, that calls for the opinion and conclusion of the witness.

Mr. Schafer: He's an expert in this industry, I would assume.

The Court: Read the question.

(Question read.)

The Court: Sustained.

By Mr. Schafer:

Q. In respect of the private label, Mr. Degenhardt, over the years which you've been a buyer here in the market, has the price, offering price, of the various declined?

Mr. Alioto: If your Honor please, the offering prices are a matter of price lists, and that's the best evidence of what the situation is.

[fol. 659] Mr. Schafer: The prices offered to the witness, your Honor. The record doesn't show what prices have been offered to the witness.

Mr. Alioto: All right. I'll withdraw the objection.

The Witness: The pie market pricewise has steadily declined in price.

By Mr. Schafer:

Q. And has it declined since the introduction into the market of the private label pies?

A. I would say so, yes.

Q. Now, Mr. Degenhardt, assume for me, if you will, that none of the three defendants' prices had changed in the Salt Lake City market from 1957 on, that they stood at the '57 price; would the price level in the market have stayed at $3.70 or above per dozen?

A. I would say so, yes.

Q. You mean that the prices would still be at $3.70 a dozen all through the four years—I'm talking now through '58, '59, '60, and '61, would the price declines that you've expressed, would they have occurred anyway from other manufacturers, or would the price have stayed up at $3.70?

A. Some other manufacturer would have undoubtedly came in with that price.

Mr. Alioto: I move to strike that, if your Honor please, as to what some other manufacturer would undoubtedly have done.

Mr. Schafer: He's an expert—

The Court: Oh, no—

Mr. Alioto: I object as to what some other manufacturer would have done—

The Court: Don't argue, of course, if it's objectionable. The objection is sustained. It is stricken from the record. The jury is instructed wholly to disregard it.

By Mr. Schafer:

Q. In respect, Mr. Degenhardt, of the prices quoted by the manufacturers who are not defendants in this lawsuit, have they declined below $3.70 over the last three or four years? I'm speaking of from '58 through '61.

A. Yes.

Q. Could you name some of the manufacturers' prices which have so declined below $3.70?

[fol. 660] A. Libby, Johnston, North Pacific Canners, which is Flavorpak, are three of the primary ones.

Q. Johnston, what brands do they manufacture?

A. The only one—they've got their own, the Johnston label, and they have another second label. I believe it's Mary Elizabeth.

Q. And the prices on those brands have declined '58 through '59, '60, and '61; is that correct?

A. Yes.

Q. And those brands compete with the brands manufactured by the Utah Pie Company in the Salt Lake City market?

A. Yes.

Mr. Schafer: I have no further questions.

Cross examination.

By Mr. Alioto:

Q. Mr. Degenhardt, you were interrogated about the defendants Exhibit 50, which purports to be an ad of the Grand Central Markets under date of June 30, 1961, and the jury was shown the Utah apple pie Frozen fresh ad of four for a dollar. Now, it is a fact, is it not, Mr. Degenhardt, that you personally have received a cut price offer from the Morton Company at least two full weeks before June 30 of 1961, at which you were offered and bought pies at less than four for a dollar? Is that correct?

A. I couldn't answer that question without going to the records and looking at the—

Q. Didn't you just answer counsel that you made some kind of a deal in June 16 of 1961 with the Morton Company?

A. Yes. We had bought pies from them, but I can't recall the exact price that was offered.

Q. And you don't know as you sit there now that your June 16, 1961 deal was for at least $2.85?

A. Do I know—yes, it was a price equivalent to Utah Pie. I recall that.

Q. It was a $2.85 price, wasn't it?

A. That could have very well been.

Q. And you received that prior to June 30, 1961, the date of this newspaper ad?

A. We probably did, yes.

Q. Now, if you divide twelve into $2.85, that's less than four for a dollar?

A. That was the jobber's cost.

Q. Yes, I understand that.

A. Yes.

Q. But if you do that, it's less then four for a dollar?

A. Yes.

Q. Now, I take it that when this price break was made in the market by the Morton Company, it achieved some notoriety in the immediate wholesale area?

[fol. 661] A. Well, we bought pies, yes.

Q. But you knew that it was being offered, for example to the Safeway Company?

A. Oh, I assumed when it was offered to us, it was offered to everybody.

Q. And you recognized this as the lowest price that had been offered in the market up to that point, didn't you?

A. I think I did, yes.

Q. Yes. All right. Now, when you recognized that as the lowest price that had been offered in the market up to that time, you had some information, didn't you, that the same price was offered to Safeway?

A. I assumed it was, because a price was generally offered to all buyers in a given market.

Q. Okay. All right. Therefore, you had reason to believe as of that time that the Safeway Company also had been offered this lowest price which had come into the market up to that point? Is that correct?

A. Yes.

Q. And I take it you would agree with me that if you knew about it, that most everybody else in the wholesale business knew about it?

A. Undoubtedly.

Q. Thank you, sir. Now, let's talk about this trading area. When you said that the trading area, Salt Lake trading area, didn't include Colorado and Washington, I take it, Mr. Degenhardt, that you weren't talking about the trading area for purposes of pie manufacturing?

A. I was talking about retail trading areas.

Q. Sure.

A. Broker trading areas and broker coverages.

Q. I take it you would agree with me, using one of defendants exhibits—and I assume this is why you offered it—I take it you would agree with me that if there is a pie manufacturer located here in Watsonville, California, right there in Watsonville, California, and there's a pie manufacturer located here in Salt Lake City, Utah, I take it you would agree with me that the trading area for these two pie manufacturers would include Colorado, immediately adjoining Utah?

Mr. Schafer: Your Honor, I don't think the witness is competent to testify as to what the trading area of a manufacturer is.

Mr. Alioto: Well, that's what you asked him, what the trading area was; and you specifically said, "Does it include Colorado, and does it include Washington?"

[fol. 062] Mr. Schafer: I asked him what the relevant marketing area was.

Mr. Alioto: That's what I'm trying to establish, too.

The Court: Objection overruled.

The Witness: I'm in the retail operations, not the manufacturing business. So manufacturers trading area, I would have no knowledge of what it covers.

By Mr. Alioto:

Q. Well, then, in any event, your answers with respect to the relevant market for manufacturers of pie, or your answers with respect to what constituted the trading areas, were not made, I take it, to indicate that Colorado is not a trading area for a manufacturer located in Salt Lake City?

A. No. I'm speaking strictly of a retail trading area.

Q. And I take it that when you made the answer that Washington was not in the Salt Lake trading area, you didn't mean it wasn't in the trading area of a pie manufacturer located in Salt Lake City?

A. That's right. I wouldn't qualify myself as a trading area for manufacturers.

Q. Incidentally, do you know whether or not, say, that pie manufacturing plant of the Carnation Company in Torrance, California, as distinguished, say, from the pie manufacturing plant of the plaintiff in Salt Lake City, that so far as the Washington market is concerned, do you know whether or not in terms of freight the Washington market is closer to Salt Lake City than a Los Angeles plant would be to Washington?

A. That would come under traffic. I wouldn't attempt to qualify myself on that. Freight rates differ in various areas.

Q. So in any event, your trading area remarks were not intended to indicate the relevant market so-called for pie manufacturers?

A. No, sir, it was for retail operations.

Q. Thank you.

The Court: That didn't have much to do with this lawsuit, then, did it?

Mr. Alioto: That's the point, Judge. That's the point. I think he tried to make it sound like it had something to do with the lawsuit.

By Mr. Alioto:

Q. Now, Mr. Degenhardt, I want to direct your attention to your examination relating to the difference between 24-ounce pies and 22-ounce pies. And there was a major customer difference, I think you stated?

A. Yes.

[fol. 663] Q. Now, the private label pie that Utah Pie manufactures for your company, the label which you own—is it Mayfresh?

A. Mayfresh.

Q. The Mayfresh label is a 24-ounce pie, isn't it?

A. Yes.

Q. Now, your company tried to persuade the Rigbys to make it a 22-ounce pie, didn't it?

A. There has been negotiations to that effect, yes.

Q. And your company at one point in fact issued instructions to the Rigbys to make it a 22-ounce pie instead of a 24-ounce pie?

A. Yes.

Q. Is that correct?

A. I believe that's right. It was on a tentative basis. Nothing definite.

Q. Well, there was a rather definite instruction, wasn't there?

A. Based on negotiation of price.

Q. Well, so that there won't be any question about it, would you be good enough to look at Plaintiff's Exhibit 115 for identification, and then state whether or not you recognize the signature on that letter.

A. Yes, I do. I received a copy of that letter.

Q. And the signature purports to be the signature of H.K.—

A. Chambosse.

Q. Chambosse?

A. Yes.

Q. How do you pronounce it?

A. Chambosse.

Q. Chambosse. Vice president and director of procurement.

Would it be correct to say that he was your superior at this time, January 23 of 1963?

A. He's one of the vice presidents of our company in purchasing.

Mr. Alioto: We'll offer it, if your Honor please, in connection with the cross examination of this witness, on the matter of ounces.

Mr. Schafer: I'm not able to understand the relevance of the document, your Honor. Moreover, I suppose the same objection lies with this document as has been upheld with all the documents I offered.

Mr. Alioto: On the contrary.

The Court: The objection is overruled. The document is received in evidence.

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[fol. 664] Mr. Billings: Is this offered against either the Carnation Company or Pet?

Mr. Alioto: This is offered in connection with cross examination of this witness, and specifically in connection with those questions asked by Mr. Schafer about the relative importance of the weight of pies; and I don't recall that the Carnation Company objected to those questions. So the answer is, yes, it's being offered against the Carnation Company, too.

Mr. Billings: In light of that, I'll object on the ground that this is a self-serving statement and is hearsay as to the Carnation Company.

Mr. Alioto: Well, it can't be self-serving, if your Honor please, because the plaintiff didn't write it. It could only be self-serving if the party wrote it.

The Court: Yes.

Mr. Billings: It's certainly hearsay as to the Carnation Company as between Mayfair Markets and Utah Pie Company.

Mr. Alioto: We'll offer it, if your Honor please, in connection with the cross examination of this witness.

The Court: The objection is overruled. Received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 115 for identification was received in evidence.)

Mr. Alioto: This is dated January 3, 1963, and states as follows:

"Utah Pie Company, Attention Mr. Gaylen S. Rigby. Gentlemen: This is your authorization to change the weight of our private label pies from 24-ounce to 22-ounce. Also, to change the wording on the carton. Yours very truly, H. K. Chambosse, vice president and director of procurement."

By Mr. Alioto:

Q. Now, you say you received a copy of this letter at the time?

A. Yes, I did.

[fol. 665] Q. Now then, I take it there were subsequent discussions—or, state whether or not there were subsequent discussions at which the Rigbys convinced you folks that the cost savings on 24 as against a 22-ounce pie couldn't be—would be less than a penny a pie?

A. When that letter—I got that letter—Mr. Chambosse phoned me, and I was negotiating whether or not it was practical—to negotiate the price on the 22 against the 24-ounce pie.

Q. And you were told, were you not, that the cost savings would be less than a penny a pie?

A. I was told it would only be ten cents a dozen.

Q. Ten cents a dozen, which is less than a penny a pie, isn't it?

A. At which time I informed Mr. Rigby to hold up changing that—to change the ounces of that pie—until we went into it further, on no more of a price reduction than that.

Q. So then you stayed with the 24-ounce?

A. We are presently staying with the 24, yes.

Q. Okay. Now, with respect to this private label business, your company negotiated the private label arrangement with the Utah Pie Company sometime in the spring of 1961, didn't it?

A. That sounds—I couldn't exactly say the exact time. That sounds about right.

Q. However, so far as the Ogden division of your company was concerned, the division with which you are working, you didn't buy a private label pie until February 14 of 1962—

A. That's right.

Q. —or after this complaint was filed?

A. In—right after the first—right early in '62, yes.

Q. In '62?

A. That's correct.

Q. Now, from the spring of 1961 to February 14 of 1962, Mr. Rigby made repeated offers to you, did he not, to sell you this private label, as they were buying it in the Salt Lake Division?

A. Yes.

Q. And you told him you wouldn't buy it because you had a lower price from Morton? Is that correct?

A. I don't remember the text of the conversation. We were using Morton pies at that time, and we didn't change at that particular time.

Q. Well, wasn't your statement to Mr. Rigby that you wouldn't buy his pie because you had—the private label—because you had a lower price from Morton?

A. I can't recall whether I said that or whether I didn't.

Q. Well, was it a fact that you had this lower price from Morton?

[fol. 666] A. I don't recall what the price of the Mayfresh pie was at that particular time. I'd have to go into the record to determine that.

Q. In any event—this was part of the period of time when you had what you called the lowest price on the market up to that point; namely, the $2.85?

A. No—yes.

Q. That would be an instance, then—I think you testified, and I am directing this line of inquiry toward your testimony that you said it was normal for a private label to sell for a lower price than an advertised brand. Now, the Morton pie, of course, is an advertised brand, isn't it?

A. Yes.

Mr. Alioto: We have no further questions, if your Honor please.

Redirect examination.

By Mr. Schafer:

Q. Was a $2.85 price on Morton, sir, lower than the private label in absoluta dollar amount on an ounce-for-ounce basis?

A. Not on—the Mayfresh is a 24-ounce, and the Morton is a 22-ounce.

Q. So the Morton was only lower in terms of dollar value per dozen?

A. Yes.

Q. Do you recall the prices at which you bought Morton pies in early 1961?

A. No, I can't. I can't recall without going to records the exact price we paid.

Q. Do you recall that in June of 1961 was the first time you were offered the 2.85 price?

A. I remember it was about the middle of the year, about the time the pie—these ads in question were—that was when the price of pies came down under $3.00.

Q. Do you recall whether the Morton price quotation was a continuing price reduction or whether it was just one of these spot offers?

A. I am sure it was just a short-term offer.

Q. And the private label pie which Mr. Rigby was seeking to get you to buy was a permanent price, am I correct in that understanding?

A. Yes.

Q. And do you recall—you said you did not recall what that price was on the Mayfresh label.

A. At that time the price was somewhat over $3.00, but it came down competitively with the Utah brand pie.

Q. Now, in respect to this problem of trading area, Mr. Degenhardt, the retail marketing areas which you defined, I take it by that you meant that in that area the retailers are in competition with each other?

A. Yes.

[fol. 667] Q. And they see each other's advertisements in the newspapers? You have to answer yes or no because the reporter can't record your nods.

A. Yes.

Q. Do you check the ads regularly, sir?

A. I do.

Q. Retail ads?

A. Yes, I do.

Q. Of your competitors?

A. Yes, I do.

Q. Do the manufacturers' prices, in effect, pretty much determine what the retail price is?

A. Yes.

Q. Could you tell us why that is, Mr. Degenhardt?

A. In the retail advertising business we are working under what we call the six per cent law in this state. It is a state law where we are required to take a six per cent over cost mark-up. That is a minimum legal at which we can sell.

Q. If I can understand it, then, you take the manufacturer's price and you have to add six per cent, and I take it you don't add any more than six per cent?

A. For an ad, normally, no.

Q. You try to get the lowest possible price you can at retail?

A. Yes.

Q. And you can't get any lower price, then, than the manufacturer's price plus six per cent?

A. No.

Q. In your judgment, Mr. Degenhardt, as a buyer, does the fact that the retailers are in competition with each other in a defined market have an effect upon the prices charged by the manufacturers in that market?

Mr. Alioto: I submit, if your Honor please, that this witness is not competent to testify as to what influences a manufacturer in Rye, New York.

Mr. Schafer: Not influences—

Mr. Alioto: He is there. He ought to be brought out here to talk about that, and they ought not to try to get it in in the back door. Mr. Vail is available to tell us what influences the pricing. He is back in New York.

Mr. Schafer: Mr. Vail doesn't do the pricing.

The Court: Well, let me have the question read. I wasn't listening to it.

(Question read.)

The Court: Sustained.

[fol. 668] Mr. Alioto: He is trying to find out what is in the manufacturer's mind.

The Court: Sustained.

By Mr. Schafer:

Q. In connection with the testimony you have just given, Mr. Degenhardt, in respect to the retail price law, can you take a 2.85 price and divide it by 12 and just say that is your retail price?

A. No. You have to add six per cent onto that.

Q. In your judgment, Mr. Degenhardt, is a 2.75 price on a 24-ounce pie necessary to meet competition of a 2.85 price on a 22-ounce pie?

A. What is that again?

Mr. Alioto: This is a legal question that is being asked.

The Court: Read it, Miss Reporter.

(Question read.)

The Court: Sustained.

By Mr. Schafer:

Q. In order to get your trade, Mr. Degenhardt, as a buyer, is it necessary for a manufacturer of a 24-ounce pie to quote a price of 2.75 in response to a price quotation of 2.85 on a 22-ounce pie?

A. No.

Q. If I understood your testimony earlier, sir, you do not, if you can help it, advertise a pie at retail unless you can advertise it at a price competitive with your retail competitors, is that correct?

A. That is correct.

Q. If you see advertisements in the papers offering a retail price less than you are able to offer, does that mean that you refuse to buy a manufacturer's pie unless it will permit you to quote a retail price equal to the one you have already seen in the newspaper?

A. Well, if somebody else is advertising a pie cheaper than what I can, I start shopping around.

Q. To get a pie—

A. Of equivalent price that we can meet the price, that particular price with.

Q. And do you refuse to buy a manufacturer's pie unless you can meet the price—buy his *buy*, I should say?

A. Yes.

Q. Unless you can meet the retail price, I should say.

A. Yes.

[fol. 669] Mr. Schafer: We have no further questions.

Recross examination.

By Mr. Alioto:

Q. At the time that Morton gave you this low price offer, do you recall that the Utah Pie Company offered you prices at 2.75 and you turned them down?

A. I believe—if I recall right, Morton offered a price on pies, and we bought them. He offered me a price and we bought the pies. We were not stocking Utah pies in Ogden at that particular time, I don't believe.

* * * * * * *

Q. * * * Now, then, your Morton order permitted you to pick up the pies in Watsonville, didn't it?

A. I believe they were based in— Yes.

Q. It was an f.o.b. Watsonville price, wasn't it?

A. Yes.

Q. For 2.55?

A. I believe the invoice shows 2.55 Watsonville.

* * * * * * *

Q. Do you recall, when you had this 2.85 and 2.55 price, which you have said was the lowest price in the market—do you recall, when you had it, as to what proportion of the goods you picked up in Watsonville and what proportion of the goods you picked up here?

A. At that particular time we were not carrying Utah Pie products.

Q. No, no, no. I am talking about Watsonville.

A. Yes.

Q. Watsonville is Morton.

A. Yes.

Q. Not Utah Pie. I want to know what proportion of the pies you picked up on that order, what proportion of your order of Morton pies did you pick up in Watsonville and what proportion were delivered here by Morton, that you picked up here.

A. We picked them all up in Watsonville.

Q. Your entire order, then, was picked up on a 2.55 f.o.b. basis in California, is that it?

A. Yes.

Q. In Watsonville. And that is the only price you had. You didn't have any 2.85 price, did you?

Mr. Schafer: That is what the record shows, Mr. Alioto. It is exactly the same objection made to my interrogation. All the records are in evidence.

[fol. 670] A. We don't consider an f.o.b. California price as our cost.

By Mr. Alioto:

Q. I understand that.

A. We add freight on to determine our costs, whether it is brought in by a common carrier or whether the company truck brings it in. We figure the cost delivered here.

Q. I understand that, but you picked up all of your order in Watsonville yourself.

A. Yes.

Q. So you bought at a 2.55 f.o.b. Watsonville price.

A. Yes.

Mr. Alioto: That is all.

Redirect examination.

By Mr. Schafer:

Q. Is that purchase that you were just discussing with plaintiff's counsel—is that recorded in the invoice which is marked as Plaintiff's Exhibit 12?

A. When was that one sold? That was in July 6. We paid 2.59 f.o.b. Watsonville on that one.

Q. And what quantity was that? This is Plaintiff's Exhibit 12.

A. There were 550 of apple and 350 coconut, 900 cases.

Q. Did your purchases of apple pies or coconut pies from Morton have any effect upon the plaintiff's business with your organization?

A. At that time, no.

DUANE S. HALVARSON recalled as a witness on behalf of defendant Morton, having been previously duly sworn, was examined and testified further as follows:

* * * * * * *

Cross examination.

By Mr. Alioto:

Q. Mr. Halvarson, I did want to cover one very, very short matter with you, so we might have it as part of this record. It is a fact, is it not, that you have a delivered price system within the zones which are set forth on your zone map, M-38, a delivered price system?

A. With the exception of Denver.

Q. Yes, that is correct. I mean with the exception of the—

A. 7-3.

Q. (Continuing) —7-3 zone, which is Wyoming, part of Nebraska and Colorado, is that correct?

A. That is correct.

[fol. 671] Q. Within these other zones, however, you have a delivered price system?

A. Yes.

Q. And the price system is the—it is a uniform delivered price within the entire area of the zone, that is correct, is it not?

A. That is correct.

Q. And you do not have an f.o.b. plant price to the people in that area?

A. We have no published f.o.b. plant price.

Q. And you don't have a private f.o.b. price to anybody else, to anybody else, do you?

A. No, we don't.

Mr. Alioto: Okay. We have no further questions.

Redirect examination.

By Mr. Schafer:

Q. Is it your testimony that you don't have a freight allowance?

A. I didn't say anything about freight allowance.

Q. Do you have a freight allowance, Mr. Halvarson?

A. Yes, we have a freight allowance.

Q. In W-93?

A. In W-93, in W-94, in W-95, and in W-92.

Q. And a freight allowance, am I correct in understanding that means a purchaser is given an amount if he picks the material up in Watsonville, California?

A. That is correct.

Mr. Schafer: No further questions.

Recross examination.

By Mr. Alioto:

Q. Just to clarify that and to make it specific with reference to this case: At the time that the witness who preceded you and the Safeway Company—at the time those two companies were permitted to go to Watsonville and pick up their goods for 2.55 in the case of Safeway, could a man who lived in Watsonville also have gone to the warehouse, or to your plant, and picked up apple pies for 2.55?

A. Yes.

Q. Then you had a 2.55 f.o.b. price. That's what I was asking, and you said "no" a moment ago.

A. Here is the area of misunderstanding. He would be billed at 2.85, if that were the existing price, and the 30 cent pickup allowance, if applicable at that point. Now, the man in Watsonville would not get the same pickup allowance the man in Salt Lake would get.

Q. I am talking about whether or not—you remember the Safeway invoice was $2.55.

A. That is correct.

Q. And Safeway picked it up.

A. That is correct.

[fol. 672] Q. They just paid you 2.55?

A. That is correct.

Q. I want to know, could the man who lived in Watsonville have gone to the plant and given you 2.55 and walked away with a dozen apple pies?

A. No.

Q. He would have to pay a higher price?

A. That is correct.

* * * * * * *

DOIL SMITH called as a witness on behalf of defendant Continental, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schafer:

Q. Would you state your name and address, please, Mr. Smith, for the record.

A. Doil Smith, 1400 West Third, Denver, Colorado.

Q. And your address—I'm sorry, you gave your address as what?

A. Business address, 1400 West Third; home address, 1610 Fairfax.

Q. In what city?

A. Denver, Colorado.

Q. And you are associated with what organization, sir?

A. King Supers.

Q. Would you describe what King Supers is for the jury?

A. King Supers is a division of the J. S. Dillon Stores Company of Hutchinson, Kansas, operating supermarkets in the Colorado area.

Q. It is a chain of supermarkets?

A. It is a chain of supermarkets.

Q. Directing your attention, Mr. Smith, to 1959, with whom were you associated at that time?

A. Busley's Supermarket Company.

Q. And what is your function with the Busley's Supermarkets?

A. I was grocery merchandise manager.

Q. Was that a chain of supermarkets also?

A. This was a chain of supermarkets.

Q. And what did you do as grocery merchandising manager?

A. I was completely in charge of accepting and procuring merchandise in the grocery department for the chain, and planning promotions.

Q. In that function did you buy frozen food products, including fruit pies?

[fol. 673] A. I either purchased personally or directed the buying department to purchase for us.

Q. In that connection, Mr. Smith, did there come a time in 1959 when you bought a substantial quantity of Frost 'N' Flame pumpkin and mince pies manufactured by the Utah Pie Company?

A. Yes, sir.

Q. And when was that, can you recall for us?

A. Yes, sir. This was just before Thanksgiving, or the holiday season.

Q. Can you recall why you purchased those pies?

A. Yes. I had previously lived in Utah. I knew the Utah Pie Company quality. We were approached on the pie, checking the quality, checking the size, checking the price. It was a good promotion item and seasonable.

Q. You say it was a good price?

A. Very good.

Q. A very good price. What do you mean by that, sir?

A. The going price, as I remember, at that time was—the retail price was 47, 49 cents. The cost of these two varieties—this could be off a few cents either way—but as I remember, it was around $4.25 a dozen. And we procured these pies at something less than 33 cents.

Q. 33 cents—what do you mean?

A. Each. 33 cents each.

Q. How does that compute out?

A. Around $3.00—as I remember, the price was around $3.70 or thereabouts.

Q. I see.

A. With an advertising allowance.

Q. Do you recall whether or not in 1959 that was the lowest price on pumpkin and mince pies that you were offered as a buyer?

A. I'm sure that it was.

Q. How many of such pies did you buy, if you can recall, sir?

A. This would be hard to give, except on estimate, without going to records. And this company being no longer in existence, this could pose troubles. But we bought one truckload, and within a very short time after that placed a rush order for our second truckload. Each truckload, as I remember, was 1,500 dozen, or thereabouts.

Q. So you recall you bought two truckloads of the pumpkin and mince; is that correct?

A. It would be approximately 3,000 dozen.

Q. You say the second truckload order was a rush order?

A. Yes.

Q. I take it the pumpkin and mince business is a seasonal business; am I correct?

A. Just ahead of Thanksgiving and Christmas season.

[fol. 674] Q. Was the plaintiff at that time seeking to induce you to buy the fruit flavored pies, frozen fruit flavored pies?

A. Not at that time in frozen. Shortly after that in the fresh pie.

Q. In fresh pie?

A. But not a frozen pie. The only thing that was offered was pumpkin and mince.

Q. Do you recall, Mr. Smith, what Morton's price was in the pumpkin and mince season of 1959?

A. I couldn't get it without records. I would say something in the neighborhood of four and a quarter a dozen.

Q. Now, in 1960, Mr. Smith, did you buy the pumpkin and mince from the Utah Pie Company again, in 1960?

A. No, we did not.

Q. Can you tell us why not?

A. We ran into a little trouble in cleaning up the last load of 1959.

Q. What do you mean by that, sir? Does that mean you didn't sell them all?

A. Well, we didn't sell them all, and we were cleaning up in the spring of 1960 some of the seasonal pies that we had from the previous purchase; and the market had

changed, with many more manufacturers coming into that market, and our market had become much more competitive than it had been the previous year.

Q. Who were the manufacturers in the market in 1960 that you can recall?

A. As I recall, there was Morton, Banquet, Swanson, Pet, Simple Simon. Pet was in on two and three varieties. Swiss Miss, a large family, Pet-Ritz, and the regular. Ocoma had a few in. There were about—Johnston, and Mrs. Smith's. There were about nine or ten varieties offered to us.

Q. Were these various brands—I take it they were generally—they were competing with each other for the business?

A. Competing for the business, yes.

Q. And were their prices generally speaking similar?

A. On the regular line of pies, very close.

Q. Yes. And when the plaintiff came back in 1960 seeking pumpkin and mince business, was his price competitive with that general level of price on the market?

A. It's possible—I don't know now—it's possible that it could have been competitive, but not below.

Mr. Alioto: If he doesn't know now, then he ought not to testify on something that we can get exactly—

Mr. Schafer: We don't want you to guess.

[fol. 675] The Court: All right. The objection is sustained, and the answer is stricken.

The Witness: Okay.

By Mr. Schafer:

Q. Did Morton's price in 1960 cause you not to buy the pumpkin and mince from the Utah Pie Company?

A. Not necessarily Morton's, but prices being offered on that market, yes.

Q. By the various manufacturers in the market?

A. Right.

(Defendant Morton's Exhibit No. M-59 was thereupon marked for identification.)

By Mr. Schafer:

Q. Now, Mr. Smith, I'm going to show you a group of retail advertisements which have been marked Morton's Exhibit 59 for identification and ask you if you can identify those as being retail ads appearing in the Denver market.

A. Yes. These are Denver retail ads.

* * * * * * *

(The exhibit marked Defendant Morton's Exhibit No. M-59 for identification was received in evidence.)

Mr. Schafer: I'd like to show this group of Denver advertisements, quite similar, probably, to the earlier ones. Here is a 1958 advertisement, and you'll find Morton's pies being advertised by Busley's, which is the witness's organization, at 39 cents apiece. Here's one, Morton's 39 cents in 1958. This is 1958 also. It's hard to find the ads. There it is—39 cents again from Morton in '58. Pumpkin and mince. These are all pumpkin and mince, I should state. Now, here in 1959, then, we have Morton's being advertised by this organization, Thriftway at two for 89 cents down in that small block.

[fol. 676] This is another 1959 ad. Here is the ad up here. Here's the Frost 'N' Flame that the witness has just been testifying to. Advertised by Busley's stores at three for a dollar.

And another Busley's ad, and another advertisement at three for a dollar of plaintiff's Frost 'N' Flame pie, again in 1959.

And I think this will show the same thing. Here is 35 cents, Piggily Wiggily Stores, Frost 'N' Flame pie. There it is there. Another three for a dollar Frost 'N' Flame, by the Busley's on December 21, 1959.

Then we pass to 1960. And Piggily Wiggily Stores are advertising Morton's pies at two for 79 cents in the Denver

market. And the A. G. Stores are advertising Morton's pies at 39 cents, which, of course, is higher than the three for a dollar price the year before.

And here is Morton now down to 1960, November 17, 1960, three for a dollar pies, which were quoted the year before on the Frost 'N' Flame pie.

And again, another Morton ad in the Red Owl Stores at three for a dollar in November of 1960.

By Mr. Schafer:

Q. When did you start in the frozen food business, Mr. Smith?

A. In 1950 I went with it, as merchandise manager of the Busley Stores in Denver.

Q. And do you recall that Morton was one of the earlier competitors in the Denver market or not?

A. Yes, I recall that Morton was one of the first to offer a line of frozen pies in the Denver area, frozen desserts.

Q. Am I correct in understanding that in those years—what year would that be, about, sir?

A. This again is recollection. I would say '56, '57, was the first inkling, where it got to be much volume.

Q. It was a very low-volume industry at that time?

A. It was low volume at that time.

Q. Now, in the years since 1960, have the number of brands being offered in the market stayed about the same or increased, or what happened?

[fol. 677] A. It's tremendous now.

Q. And could you identify for us, sir, in terms of 1961, the brand names competing for the business in the Denver market?

A. This line that I gave you a few minutes ago would be about the regular line that is offered at the present time, which would be—do you want me to repeat them?

Q. I don't want you to repeat them if they stayed the same.

A. They stayed approximately the same. There have some come, and some gone.

Q. But you mention Banquet in 1960.

A. Banquet is on the market, yes.

Q. Now, Mr. Smith, I wanted to ask you in terms of this problem we've been having about identifying the relevant market area. Do you consider Denver as a separate market for frozen fruit pies?

Mr. Alioto: I submit, if your Honor please, that this—now he's talking about the relevant marketing area for manufacturers, pie manufacturers. This witness is not competent to do it. On the other hand, Mr. Vail in New York probably would be competent to do that.

Mr. Schafer: Every witness that Morton has had is competent to do that, I'm sure, and they have.

Mr. Alioto: A while ago we went through that, and it was admitted, if your Honor please, later on that he wasn't talking about the same thing that I was talking about. Now he's going to go through it again with a witness who is not qualified, while their own Mr. Vail is sitting at this moment in New York.

Mr. Schafer: Mr. Vail is not the only person in the Morton organization competent to testify as to this. Mr. Halvarson is, Mr. Kitchin is, and everybody else.

Now, your Honor, May I say something, sir? In respect to the witnesses, the last witness's testimony, he identified the relevant retailer marketing area. And I submit to your Honor that that determines, that has to determine, the competitive activity between the manufacturers competing for the business in that relevant retail marketing area. I think that's why this is a relevant question to ask.

Mr. Alioto: I submit it's argumentative, and I don't think it's factually accurate. The marketing area for pies is determined by the location of the plants, not by the retail market.

[fol. 678] Mr. Schafer: Your Honor, he's simply arguing the case.

Mr. Alioto: My objection, if your Honor please, is that this witness is not competent to talk about the relevant market for pie manufacturers—

Mr. Schafer: No.

Mr. Alioto: —as distinguished from a retail.

Mr. Schafer: We'll argue the legal conclusion, your Honor. I simply want him to identify what the relevant market is in terms of the competitive activity at the retail level and what determines the retail prices of the pies.

Mr. Alioto: All right. Well, then, if he's talking about the retail market, I have no objection. If he's talking about the relevant market for pie manufacturers, I do have an objection.

Mr. Schafer: We'll argue that as a legal objection, your Honor, what determines the relevant market from the manufacturer's point of view.

Mr. Alioto: I withdraw the objection on that basis.

The Court: All right.

Mr. Alioto: I withdraw the objection.

By Mr. Schafer:

Q. I just wanted you to speak, sir in terms of a retailer, as a buyer. As a seller at retail, what do you conceive to be the relevant marketing area in and around Denver?

A. Our ads in and around Denver apply for approximately a sixty to 65 mile area, taking Denver as the nucleus.

Q. And what effect does that fact have on how you determine what the geographical area of the Denver market is?

A. Let me maybe answer it this way. An ad that is ran in a community sixty-five miles from Denver doesn't affect our stores in the Denver area. The people don't consider that this is a Denver ad. Is this what you mean?

Q. I guess so. Let me see if I can make it clear to myself. I take it there's price competition among retailers in the Denver market?

A. Right.

Q. And that price competition, I take it, is expressed mostly through newspaper advertising?

A. Yes.

[fol. 679] Q. Of the sort we've seen in the exhibit I just showed you?

A. Yes.

Q. And in that way, retailers keep informed as to what other retailers are charging at retail; is that correct?

A. This is right.

Q. And that nobody, I take it, in an area described by the circulation of whatever the Denver newspaper is, nobody can get a higher price at retail than what's being advertised by other retailers?

A. That is right.

Q. In order to sell frozen fruit pies we have to sell at retail at a price competitive with your retail competitors?

A. That's right.

Q. Did you tell me that the retail market in Denver was competitive?

A. Very.

Q. Is Denver an isolated area in terms of population accumulation?

A. Denver is looked on nationally as an isolated area, because it is the nucleus of many test areas, because the manufacturer is able to offer something there and not have it overlap into other areas.

Q. Does the retail price on frozen fruit pies being offered in the Salt Lake City newspapers affect the retail price in the Denver stores?

A. None.

Q. Am I correct in understanding, Mr. Smith, that the manufacturers' price to the store has an effect upon the retail price which the store charges?

A. In most instances.

Q. Can you spell that out for us?

A. If the price is—if you're not able to buy at a price competitive to what's offered in your market, you have no choice but to meet that price, regardless of what you paid the manufacturer.

Q. If a manufacturer comes to you with an offering which doesn't permit you to sell at retail at a competitive price, do you go ahead and buy the product anyway?

A. Not if I can buy a competitive item, so that I can be competitive and still not lose money, or show a profit.

Q. Now, is the generally prevailing price in the Denver market now, Mr. Smith, is that lower than $3.70? I should say in 1961, if you will.

A. Yes. Much lower.

Q. And are there companies in the Denver market other than Pet and Carnation and Morton that are offering prices to buyers lower than $3.70?

A. Banquet. I don't know who the makers of some of the other items are. We have a private label situation.

Q. But there are—

A. That are being offered.

[fol. 680] Q. Am I correct in understanding that there are a number of other brands being offered in the market at a price lower than $3.70, brands other than the brands identified by the three defendant companies?

A. Yes.

Q. Is Denver much of a private label market, Mr. Smith?

A. With some one particular group, and some smaller groups, yes. But mainly, your majors are nationally brand minded.

Q. What is the one group that you identify as private label?

A. This Red Owl group is private label minded, and National Key has considerable private label.

Q. What are the names of the private labels, do you know, sir?

A. National Key is Natco. Red Owl have many. Harvest Queen. I don't recall theirs. They have a non-relating. Farmdale, and Ferndale.

Q. Do these private labels, sir, compete with the other brands on the market?

A. Certainly. On with that, there is Safeway, of course, with their Bel Air brand much in existence.

* * * * * * *

Cross examination.

By Mr. Alioto:

Q. Who are the three largest manufacturers of pies in the Denver area?

A. I would say—

Mr. Schafer: If he knows. Don't just guess, Mr. Smith?

Mr. Alioto: Well, you qualified him as a witness on the Denver Area.

The Witness: The three largest—

The Court: Mr. Schafer, the objection is overruled. You may proceed.

The Witness: Morton, Banquet. Beyond that I'd be guessing.

By Mr. Alioto:

Q. All right. Now, of the two you mentioned, Morton and Banquet, which is the largest in the area—the larger?

A. You mean enjoying the largest sales?

[fol. 681] Q. Yes.

A. I wouldn't have any way of knowing.

Q. But these two—a moment ago you used the expression—

A. I could tell you with our company.

Q. You used the expression, "majors." Did I hear you correctly when you said "majors"? The majors?

A. I don't know what you have reference to, sir. Major, or—

Q. Well, I thought you called some companies the majors in the area; and I was wondering what you had reference to.

A. I have reference to the pies that probably enjoy the wider distribution.

Q. And Morton would be one of those, wouldn't it?

A. Yes.

Q. And Bel Air, I take it, would be another one of those?

A. Yes.

Q. The Bel Air pie manufactured by the Pet Company?

A. I have no idea who manufactures it.

Q. And Swiss Miss would be another one of those?

A. No.

Q. All right. Now, of all of those the Morton pie is the leading pie in the Denver area, isn't it?

Mr. Schafer: What does that mean, sir? "Leading"? In terms of quality?

By Mr. Alioto:

Q. In terms of sale.

A. I wouldn't have any way of knowing that.

Q. Well, so far as your organization is concerned, is it the leading pie in your organization?

A. Yes.

Q. In other words, you buy more Morton pies than any other kind of pies?

A. Yes.

Q. Now, with respect to this relevant trading market you talked about again, I want to show you a Morton exhibit—this is exhibit—price map of M-38—your Denver area—this map is a little difficult to read. Your Denver area is right where the number 7 is, right where the number 7 is. Now, what is the closest—what was it in the years 1957, 8, 9, and 60—the closest pie manufacturing plant to your stores in Denver?

A. I wouldn't know.

Q. It was the Utah Pie Manufacturing plant, wasn't it?

Mr. Schafer: He didn't know, Mr. Alioto.

Mr. Alioto: You asked this man about the relevant market.

By Mr. Alioto:

Q. You say you didn't know in 1959—we'll take that year when you first bought the pumpkin pies—that the closest pie manufacturing plant to your market was the Utah Pie Company in Salt Lake City?

[fol. 682] A. Yes. I would assume he was closest to me, yes.

Q. Therefore, you would have—that company would have a freight advantage into the Denver market over any other company, wouldn't it?

A. Possibly not.

Q. Why not?

A. Because you have the mountains to go over, and it has a direct effect on our freight rate.

Q. Well, do you know that there is any pie manufacturing company in the United States which in 1959 when you bought those mince and pumpkin pies had a better rate than the Utah Pie Company?

A. I wasn't interested in rate. I was interested only in my cost.

Q. All right. Do you know where the Morton plants are located?

A. No, sir.

Q. Do you know that Morton has shipped some pies into Denver from Virginia?

A. I'm sure they have.

Q. From its plant in Virginia?

A. I'm sure they have.

Q. I take it you would agree with me that Utah Pie Company has a great advantage over that plant in Virginia?

A. The only thing that we worked on was an f.o.b. our stores basis.

Q. All right.

A. This was all I was interested in, and this was what I was quoted. Freight had no factor.

Q. One last question. You would certainly agree with me as a businessman and from your familiarity with this industry and your knowledge of the Denver market that's been developed by questions with counsel, you'd agree with me that Denver, Colorado, is certainly a relevant market for a pie manufacturer located in Salt Lake City?

A. No, I'm sorry, I would not.

Q. You don't think so.

A. No, sir. Not necessarily.

Q. Would you please explain to me what you mean by that answer?

A. Yes.

Q. If you tell me that this is the closest plant to Denver?

A. I'll explain it to you.

Q. Would you please?

A. Our rate is made in making up truckloads of merchandise.

Q. Yes.

A. Many times we have greater advantage to pull from the Chicago or an east market into the Denver area than we do from the West Coast. Our service is better—

Q. I'm not talking about the West Coast. I'm talking about Salt Lake City.

[fol. 683] A. Salt Lake City, outside of this one example, and we were offered two only items out of a complete assortment that we stock—it was necessary that we still went elsewhere to buy the rest of the items. If I could include these two items with the rest of the truckload, I could buy to better advantage possibly from an eastern or another market where I could make up the truckload coming into Denver. This is what I mean.

Q. Did you buy in truckload lots?

A. We always buy—

Q. From the Utah Pie Company?

A. Yes, sir.

Q. On your mince and pumpkin?

A. Yes, sir.

Q. Well, then, on a truckload lot basis, isn't it obvious that Denver is a relevant market for Salt Lake City?

A. It evidently was, from the price he quoted.

Q. Of course, it was. Now, then, the price he quoted to you, Mr. Smith, was not lower than the price he was charging in Salt Lake City was it?

A. I have no idea what the Salt Lake City price was.

Q. Okay. With respect to these ads, Mr. Smith—to begin with, pumpkin and mince are seasonal products, aren't they?

A. Yes, sir.

Q. People eat these things around Thanksgiving and Christmas?

A. This used to be, but now your pumpkin is a year round item, sir.

Q. Well, how about—they still eat more pumpkin and mince pies around Thanksgiving and Christmas than they do year round, don't they, Mr. Smith?

A. This last summer I'm afraid I would have to disagree with you.

Q. As of last summer. Well, let's go back to '59. This is when these ads were in the paper.

A. It was very seasonable.

Q. Very seasonable in 1959. So I take it that it would be natural that there would be more sales activity on pumpkin and mince in December than there would be in February?

A. More in November than December.

Q. That's correct.

A. Yes, sir.

Q. More in November, the Thanksgiving and Christmas season, than there would be in February?

A. Yes, sir.

Q. And I take it, therefore, that we might in a competitive market expect certain price differences to appear as between November and February?

A. Surely.

Q. For example, I take it you would agree with me, to use an analogy, that there is a difference in the Christmas tree market between December 20 and January 20?

A. That's right.

Q. Now, on this price of mince pie and pumpkin pie that you received from the Utah Pie—you said that was 33 cents a dozen—

A. $3.00—no. It was approximately—

[fol. 684] Q. 33 cents per pie?

A. I believe that I said less than 33 cents.

Q. Well, 32 cents.

A. My cost was $3.70, less ten cents advertising.

Q. It was $3.70 less ten cents advertising. And advertising included advertising, I take it? You had to advertise in order to get that allowance?

A. No contract, sir.

Q. But I mean you did?

A. We did advertise. We bought them to advertise.

Q. Okay. Now then, you say that you had some left over in February and March?

A. Yes, sir, we sure did.

Q. Is that it?

A. Yes.

Q. All right. Now, at that time some other pie manufacturer came in with a lower price?

A. Not on these two varieties.

Q. Well, did—

A. We were only trying to clean up what I had bought in November and December. We bought no more mince and pumpkin.

Q. Then I misunderstood your testimony that there was some kind of different price activity in the spring of 1960?

A. This was the following year. The price activity in the spring of 1960 was only at retail level. Cleaning up what we had left.

Q. Well, how about the manufacturing level?

A. They weren't being offered this time of year, sir.

Q. All right. Then, in the following year, in the following year, did you have any negotiations with Utah Pie Company—

A. Yes, sir.

Q. —on mince and pumpkin pies?

A. Yes, sir.

Q. You were in Salt Lake City, you said, at one time?

A. You mean during this period?

Q. No. You worked in Salt Lake City at one time?

A. Yes, sir.

Q. And you started to say in your testimony—I don't know whether you finished—that "I knew the Utah Pie quality."

A. Right.

Q. Before you purchased it. What did you mean by that?

A. I meant that it had always been acceptable. So it didn't come in as a complete stranger when Gaylen come to sell me.

Q. So it was a product that had commercial acceptance?

A. In Utah.

Q. In Utah. And you also knew that it was a product which had quality acceptance in Utah?

A. In Utah.

Q. As a matter of fact, it's a rather fine business organization, as you knew it, in Utah? Isn't it?

A. I didn't have any business dealings with them in Utah. Only an indirect way.

[fol. 685] Q. Do you know the Mar Stores in Denver, Colorado?

A. Yes, sir. This is the—Busley was a division of the H. A. Mar Grocery Company. They also owned the franchise of the Piggily Wiggily, which one of these ads were. And they were the group that sold out to the Red Owl Stores, which were some of the ads that were in there.

Q. So, now, was the Marr Company associated with your organization—is it associated with your organization today?

A. Oh, no. The H. A. Marr sold out to the Red Owl Stores.

Q. Approximately when was that?

A. January 1 of 1960.

Q. And are the Red Owl Stores the same as your organization today?

A. No, sir. I left the Red Owl Stores in June of '60.

Q. That is a different organization?

A. It is a complete different organization.

Q. Is the Red Owl organization a large buying organization in Denver?

A. Yes, sir. With headquarters in Hopkins, Minnesota, the main buying office in Hopkins.

Q. Which is the largest of the buying organizations in Denver?

A. Safeway Stores.

Q. In terms of volume. And after Safeway stores?

A. According to the survey they class this group that I am with now as No. 2, King Supers.

Q. King Supers?

A. King Supers.

Q. How many markets do you have?

A. We have fifteen.

Q. And how many markets do the Red Owl folks have in the Denver trading area?

A. I don't know. I know how many—there was 19 when they purchased the H. A. Marr Grocery Company, but some of those have been closed and others opened, so I don't know how many they have now, but it would be, oh, 14, 15.

Q. In other words, very close to your group in terms of units?

A. Right.

Q. In sales volume there would be—

A. No comparison.

Q. In other words, your group has the greater sales volume.

A. Yes, sir.

Q. But Safeway leads all—

A. We rank No. 2 in the Denver area.

Q. And Safeway leads all of them in terms of volume?

A. That is right, sir.

Q. Do you know how many Safeway units there are in the Denver area?

A. No, I don't. Approximately sixty.

Mr. Alioto: We have no further questions.

[fol. 686] Redirect examination.

By Mr. Schafer:

Q. Mr. Smith, if the record in this case shows certain sales made by the plaintiff company of pumpkin and mince to H. A. Marr Stores, are those the sales to which you were testifying earlier?

A. This original group was bought completely for the Busley Supermarkets, yes.

Q. And you were, in effect, operating as the buyer for H. A. Marr Stores?

A. I was merchandise manager and buyer for the Busley Stores, and the H. A. Marr were warehousing and distributing this merchandise, so our directive went to them to procure the merchandise for us.

Q. It was all one organization?

A. This is right.

Q. Does the Utah—let me start by asking you this: Can you define for us what a brand franchise is. Are you familiar with that term?

A. I don't believe that I know what you mean.

Q. Does a brand name by itself have any impact, so far as you know on its sales?

A. Sure.

Q. Now, could you tell me— That's what I mean by "brand franchise," sir. Could you tell me what you mean by a brand having an impact on sales?

A. Let's use an example, Del Monte. Everybody knows Del Monte, and it has a definite impact on the sale. It is an easy item to sell.

Q. Does the name "Utah" on the plaintiff's product in this action have any commercial significance in the Denver market?

A. None.

Q. Does the quality to which counsel addressed you have any significance in the Denver market? Do people know about the quality?

A. They don't know of the quality of the item.

Q. Did I understand you correctly to testify, sir, that, in respect to the 10-cent advertising allowance that was offered to you by the plaintiff company on these purchases of pumpkin and mince, that you were not required to advertise?

A. We had no contract to force us to.

Q. But you could advertise or not as you would?

A. Right.

Q. Did you choose to advertise?

A. Oh, yes.

Q. Why was that, sir?

A. We felt that this item would have terrific drawing power at the price we could sell it at. Denver hadn't heard of three for a dollar pumpkin and mince pies.

Q. And you bought those pumpkin and mince pies in truck load lots, is that correct?

A. Yes, sir.

Q. As a buyer, sir, do you prefer to buy truck load quantities of assorted flavors or just one flavor?

[fol. 687] A. It is easier to buy assorted, because of the space and turnover.

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HERMAN TAYLOR called as a witness on behalf of defendant Continental, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schafer:

Q. Would you state your name, please, sir.

A. Herman Taylor.

Q. And your address?

A. Memphis, Tennessee.

Q. And your employment?

A. I am an accountant with Continental Baking Company.

Q. Did there come a time, Mr. Taylor, when you were asked to review, in 1961, the operations of the Del Mar Food Products Company to ascertain whether or not their contract with Continental, Morton, was profitable to them on packing fruit pies?

A. Yes.

Q. Let me show you Morton's Exhibits 60 and 61, sir, and ask you if you can identify—and 62, excuse me—ask you if you can identify what those documents are?

A. Yes, these are—No. 60 is my work papers.

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[fol. 688] Q. Did you reach the conclusion that the contract which Parkway, or Del Mar, held with Continental was profitable to Del Mar?

A. Yes, I did.

Q. Did you analyze it in terms of a profit per dozen, Mr. Taylor?

A. Well, I didn't figure the profit per dozen. I figured the cost per dozen from the time they started producing up through September 30. Now, sometime during that producing period they were paid one price, 53 cents per dozen; at other times they were paid 50, depending on the shift operations.

Q. Was the cost to them always less than 50 or 53 cents, whichever the case may be?

A. Yes.

* * * * * * *

Cross examination.

By Mr. Alioto:

* * * * * * *

Q. And at this time this plant, which had been packing pies for Morton, was in the hands of creditors, is that correct?

A. Well, it was going through a reorganization. The creditors were setting it up, setting up an organization to operate it.

Q. Was it being actually operated by a group of creditors at the time you were there, Mr. Taylor?

A. It was in the process, sir. They were holding meetings, and so forth.

Q. And when was it that the creditors took over this plant that had been packing Morton pies?

A. That I don't know, because I spent one week there and left. I have never been back there since.

Q. How long had this plant been packing Morton pies?

A. It started in February of 1961.

Q. And then in October of 1961 it was in the hands of creditors?

A. Well, I presume that's what happened eventually.

Q. And how long did these creditors hold onto this plant?

A. That I don't know. I have never been back there since, sir.

Q. Then the plant was entirely reorganized, is that it?

[fol. 689] A. I presume so, if it is still operating.

Q. Did you folks put any money into the reorganization?

A. Not to my knowledge, no, sir. I was sent out to make that study, and that was all.

Q. In what other business was the Parkway Foods engaged in 1961?

A. They were apple packers, fruit packers, I guess you would call them.

Q. Prior to 1961 who packed the Morton pies out in California?

A. That I could not say. I wasn't familiar with it. I don't know whether they were packed out in California prior to that.

Q. Your study indicates—I haven't had a chance to analyze it or look at it, but you say your study indicates that they made a profit on your pies, is that right?

A. Their cost per dozen enabled them to make a profit.

Q. I didn't ask you whether they were enabled to make a profit. I am asking you whether or not your study discloses that this company did, in fact, make a profit on your pies.

A. Well, now, may I explain this, sir.

Q. You may say anything you want so long as you answer the question somewhere along the line.

A. According to the direct costs in a normal operation, they could make a profit. But if you will look at those documents, you will see figures in there of abnormal expenses that are not normal to the running of a business.

Q. Are you telling us, then, so we can get the record very clear at this point, that they should have made a profit, but they didn't?

A. Yes.

Q. Okay. And they didn't make a profit backing your pies, is that the ultimate fact?

A. According to their own balance sheet they did not.

Redirect examination.

By Mr. Schafer:

Q. Can you describe to us, Mr. Taylor, why it was that they did not make a profit during this period of time?

A. Yes.

Q. Would you do so, please, sir. If you need those documents, please feel free to refer to them.

A. Their operating statement showed, for the period of 10/1/60 through 7/31/61, which covered a period in there where the pie operation wasn't effective, because the pie operation did not start until February of '61. But in their statement, prepared by their accountant, who was hired by them, showed a net loss on the pie operation of $1,026 for that period of time.

[fol. 690] On the apple packing portion of their business, their operating statement showed a loss of $123,000.

Now, by their own records, which they had on file, as a claim against the Lord Baltimore Press, who furnished their cartons, wrapping materials, they had a claim against the Lord Baltimore—their invoice No. 149—for bad cartons, $4377.02; their invoice No. 158 for bad cartons, $1362. So there is a total of $5600 for bad cartons alone, which they were expecting to be paid.

Then they prepared their own schedule here to substantiate a claim for labor loss.

Q. A claim against whom?

A. Against Lord Baltimore for labor loss as a result of these faulty cartons, machine shut-down, and so forth. From their own figures, labor loss was $14,656.

Q. Do you know how they computed that?

A. Well, they had their form here. It is quite lengthy. I don't know whether I should read it.

Q. No, don't read it. What number exhibit is that one?

A. M-61. It is available for the record.

And then on top of those, what I would call actual items, where they would have something to support it—

The Court: Well, those are claims against Lord Baltimore.

The Witness: Right.

Mr. Schafer: That is right, your Honor.

The Witness: What I am trying to do, your Honor—

The Court: Whether it is actual or not depends on how the lawsuit turns out.

The Witness: No, what I am trying to show, your Honor—

The Court: You go ahead.

The Witness: Had they not suffered these losses, instead of losing $1,026, per their own operating statement, they would have made in the neighborhood of nineteen or twenty thousand dollars on the pie operation.

[fol. 691] By Mr. Schafer:

Q. Did they compute any other element of loss, sir, in striking their claim against Lord Baltimore?

A. In addition to that, which I wouldn't call a factual claim—

Q. By "factual" do you mean out-of-pocket, is that the expression?

A. That is right. They claimed a loss in profit of eleven cents per dozen.

Q. Loss on their apple pie—

A. That they were unable to produce because of this machine breakdown, and so forth.

Q. They computed their profit on their pie packing operation, is that right?

A. That's right.

Q. And what figure do they compute for their profit?

A. They show on that they were claiming $10,511.

Q. How much is that per dozen?

A. That would be eleven cents per dozen.

Q. Eleven cents per dozen.

A. That was their own figure.

Q. You say that is their own figures. Who computed those figures, sir?

A. Well, now, I don't know who it was. Someone in their office, their office manager.

Q. I see.

A. I am not familiar with all the names of the people that work in their office. But here is their own form.

Q. And you testified that they lost something like $126,000 on a fruit processing operation?

A. A hundred thirty-three—123 thousand, I beg your pardon.

Q. Am I correct in understanding that that part of the Del Mar operation has nothing whatever to do with Morton?

A. No.

Q. I am correct in that understanding?

A. Not that I—I could see no tie-in, other than being in the same building.

Q. But Morton has no contract, or anything like that, on the processing part?

A. No, not to my knowledge.

• • • • • • •

[fol. 692] Recross examination.

By Mr. Alioto:

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Q. What was the purpose of your visit to Watsonville? What was the business purpose?

A. The business purpose was to find out whether that 50 cents would cover—50 or 53 cents—would enable that plant to make a profit.

Q. Well, what is the 50 or 53 cents? That's what we don't know about and you know all about. Would you state in the record—

A. That's what they were allowed over and above the actual cost of ingredients and wrapping materials.

[fol. 693] Q. I see. Under your contract with them—

A. That's right.

Q. (Continuing) —they paid for the actual cost of wrapping materials and ingredients, and then you gave them 50 cents to cover everything else?

A. Right.

Q. And what was "everything else"?

A. Well, it was your labor, it covered your first month's freezing, storage, and— Well, just any other manufacturing costs that enter into an operation like that. It is spelled out, sir, in the—

Q. Overhead?

A. Overhead.

Q. G & A?

A. Yes.

• • • • • • •

[fol. 694] Q. Did you ever see that plant operate with 120 pies a minute going by?

A. I will tell you, when I made that up I didn't have time to go out and see that plant.

Q. Well, you were right there; you saw it in operation, didn't you?

A. Oh, I just sit there, I don't—

Q. Did you see 120 pies a minute going by that machine line?

A. I grant you, that is probably pretty fast.

Q. That's too fast, isn't it?

A. I don't know.

Q. Isn't that bound to jam all the cartons?

A. I am not qualified to say.

Q. In making up your cost study, this cost study, did you have occasion to inquire into whether or not they were zipping those pies through at 120 a minute?

A. That didn't enter into it, sir. I took these costs from existing records, not what they were running through at that time while I was there.

Q. I take it that the speed of those machines during the period of time that you were questioning, that you were examining, was a very substantial element in determining the cost, wasn't it, the speed?

A. No. I think you misunderstand, sir. These costs were made from their records, payroll records, etc., actual figures taken covering the period of time shown. I did not go out into their plant and make what we would call a time study with a stop watch or anything like that. I made a study here of existing records.

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[fol. 698] Q. All right. Now, did you try to ascertain before you came into this Court whether or not they collected those claims?

A. No, I did not, sir.

• • • • • • •

Redirect examination.

By Mr. Schafer:

Q. Did you have any reason, Mr. Taylor, in making this study to believe that the claim against Lord Baltimore was invalid?

A. I had no reason.

Mr. Alioto: Oh, your Honor please, he could have found out whether it was honored or not. That's the point I'm making.

Mr. Schafer: Well, I'm making the point that in 1961 he had no reason to believe he was involved.

The Court: Never mind. Never mind. Mr. Schafer, you stand up there right next to the jury and make a speech

to them, tell them what you expect the witness to testify to. The objection is sustained. Mr. Schafer's statement is stricken from the record. The answer of the witness is stricken from the record. The jury is instructed wholly to disregard it.

* * * * * * * *

GAYLEN S. RIGBY, called as a witness on behalf of the defendants, having been heretofore duly sworn, testified further as follows:

Direct examination.

By Mr. Schafer:

Q. Would you state your name, please, sir?

A. Gaylen Rigby.

Q. And you are the same Gaylen Rigby, who has previously testified?

A. Yes, sir.

Q. Now, Mr. Rigby, we've had some—or, early in this trial—well, let me first ask you to identify for us the Roundup Stores?

A. Roundup Wholesale Grocery is a wholesaler located in Spokane, Washington.

Q. And am I correct in understanding that you sell to Roundup Stores the Sonny Boy label pies?

A. Yes, sir.

Q. Now, can you recall for us, Mr. Rigby, what the price, say, on the apple pies that you sold to Roundup was starting in 1960?

A. I'm not sure. It could have been $3.00.

[fol. 699] Q. I think the record shows, Mr. Rigby, that it was $2.88. Does that refresh your recollection?

A. We did sell them at $2.88 at one time. I don't know whether it was in 1960 or when it was. I don't recall.

Q. You started the arrangement in 1960, did you not?

A. That I can't remember for sure without looking at the records.

Q. Now, as I say, we had early in the trial some California invoices of the Morton Company. I really wasn't sure I understood the significance of that. For instance, there was a Jersey Maid invoice introduced into evidence as Plaintiff's Exhibit 35, which showed a price purportedly charged by Morton of $4.11 on apple pies, and another invoice, again Plaintiff's Exhibit 35, invoice through the A. M. Lewis Company, where Morton purportedly was charging $4.04 a dozen. Now, what I didn't understand, Mr. Rigby, was that if at this time you were selling pies—and I take it at a profit, is that right, to Roundup, say?—Were you selling pies at a profit to Roundup?

A. Yes, sir.

Q. You were selling pies to Roundup in 1961 of, say, $3.10; and I take it it's understood that the freight down to California is around, what? 30 cents? Is that correct?

A. Thirty, thirty-five cents. I don't know. Something like that.

Q. Yes. So that if you added $3.00, plus your freight, you get $3.30 or $3.35, something like that? Right?

A. Yes, sir.

Q. So that a Morton price of $4.11, that doesn't have any effect upon what business you might be able to do in California; isn't that correct?

Mr. Alioto: If your Honor please, it seems to me that this calls for an opinion and conclusion on matters that are difficult to pin down factually.

Mr. Schafer: Your Honor, he's the only salesman of the company, and he surely knows what the effect is of price—

The Court: Rephrase your question. You're asking for a conclusion.

Mr. Alioto: I think he said California in connection with Roundup?

Mr. Schafer: No.

The Court: Rephrase your question.

[fol. 700] Mr. Alioto: All right.

By Mr. Schafer:

Q. If, Mr. Rigby, you could sell pies profitably at $3.35, say, in California, would a Morton price of $4.11 tend to impede any sales effort you might make in California?

A. Well, it depends on the net price of Morton and the net price of Utah.

Q. I had understood that Plaintiff's Exhibit 35 was offered as proof of a net price charged by Morton.

Mr. Alioto: If your Honor please, I don't think you can interrogate a witness as to the reason for which his lawyer offered an exhibit. He doesn't know the law, the legal significance for which exhibits are offered. I don't think he should ask him why an exhibit was offered.

The Court: He isn't asking him why an exhibit was offered. Go ahead.

By Mr. Schafer:

Q. Did you answer the question, sir?

A. Would you repeat the question?

Mr. Schafer: Would you read the question back?

(Question read.)

The Court: I reverse myself on that. It is asking for the reason the lawyer offered it. The objection is sustained.

By Mr. Schafer:

Q. As far as you know, Mr. Rigby, then, the price in California charged by Morton was not $4.11?

A. I don't know what the net price at this time you're talking about—Morton's price.

Q. And this was about the time they were charging $2.85 here in Salt Lake? Is that correct? About July of 1961.

A. I imagine in that period of time, yes.

Q. You recall that this Morton price of $2.85 about which we've heard so much was in June or July of 1961?

A. Yes, sir.

Q. And you don't know, then, your testimony is you don't know what the Morton price was in California at that time—

A. Not the net—net price.

Q. Could you define for us what you mean by net price, or net-net price?

A. Well, I shouldn't have said "net-net." I meant "net." To me a net price is the lowest possible price you can buy pies.

[fol. 701] Q. How was that computed? That was my question. How do you compute—

The Court: Does this tend to prove anything in this lawsuit? How do you compute a net price? We've gone all over that. For two weeks we've been talking about that.

Mr. Schafer: I was just trying to—

The Court: As a matter of fact, we can take judicial notice of what "net" means.

Mr. Schafer: I didn't know what the witness meant it to mean, that's all.

The Court: This lawsuit is going to be over—

Mr. Schafer: I surely hope so, sir.

The Court: Yes. You didn't let me finish.

Mr. Schafer: I'm sorry.

The Court: This lawsuit is going to be over the day before Washington's Birthday. Now, you'd better cut your cloth to suit that time, not unnecessarily using up the time of this Court.

By Mr. Schafer:

Q. Without repeating ourselves, Mr. Rigby, I understand you don't know what Morton's price was, whatever that means, in California in June or July of 1961?

A. Not for sure, no.

Q. I had understood your complaint to allege that Morton was selling at a higher price in California and at a lower price here in Salt Lake City?

Mr. Alioto: If your Honor please, what the complaint alleges—the complaint speaks for itself.

The Court: Yes.

Mr. Alioto: It doesn't mean it has to—for the entire period. I'd object to his characterization of the complaint in connection with the interrogation.

The Court: Sustained.

[fol. 702] Mr. Schafer: I was just going to remark it is his complaint—

Mr. Alioto: The lawyer framed the complaint. Not the witness.

By Mr. Schafer:

Q. Mr. Rigby, do you recall that you filed some answers, additional answers to interrogatories that were served on the plaintiff company by the defendants? Do you recall that, sir?

A. Yes, sir.

Q. And you signed those answers; isn't that correct?

A. I believe so.

Q. And am I correct that the answer you gave to Interrogatory No. 8 was that the plaintiff contends that all of the customers in the Utah trading area were sold at prices substantially lower than the prices charged to other customers of defendants located closer to defendants' manufacturing plants? Is that correct?

A. Yes, sir.

Q. But you made that statement not knowing what the Morton price was in June or July of 1961 in the area closest to Morton's plant?

A. I didn't say I didn't know what the net—I didn't say that, as I recall. I said I didn't know what it was for sure. I knew it was higher in California than here, but I didn't

know what their net price was for sure, what the ultimate was.

Q. You mean you knew what Morton's list price was—

The Court: Oh, now, don't repeat it.

Mr. Schafer: I just don't understand the answer. I'm sorry.

The Court: The witness answers you; then you state the witness's answer; and we take twice as much time.

By Mr. Schafer:

Q. The record shows, Mr. Rigby, that in the Seattle market, as evidenced by Plaintiff's Exhibit No. 11, Morton was charging on June 30, 1961, a price of $3.50 on its apple pies. Now, am I not correct in understanding that you could on your production have sold pies profitably in Seattle at $3.50 in June of 1961?

A. Yes, sir.

Q. The record shows in Plaintiff's Exhibit 13 in evidence that in Oakland, which I guess is the San Francisco market, that Morton was charging on its invoice a price of $3.76 in July 12 of 1961 on apple pies. Now, if that was Morton's net price, you could have sold profitably at that price in the California. Is that not correct?

A. $3.76?

[fol. 703] Q. Yes.

A. We could have made money.

Q. Your counsel stated in his opening address that he would show that Morton was charging $4.16 as against $2.74 here in Salt Lake City at the same time. And if it were a fact that Morton was charging $4.16 in the California markets, you could have sold at that price profitably in the California markets; is that not correct?

A. At $4.16?

Q. Yes.

A. Yes, we could have made a profit in California.

Q. So that if those were Morton's prices, Mr. Rigby—if those were Mortop's prices, they would not have affected your business or your business efforts in the California market? Is that correct?

A. No, I don't think so. Not in California.

Q. You say it's—I'm correct that it would not affect it?

A. That's right.

The Court: Not in California.

Mr. Schafer: Not in California. Right.

By Mr. Schafer:

Q. How about in the Seattle market if the price was $3.50, as the evidence shows? Would that have affected your business in Seattle? Was that too low a price for you to sell that in Seattle profitably?

A. It would have been harder to establish ourselves at that price in Seattle.

Q. I don't quite understand what you mean by "harder to establish yourselves," sir. Could you explain that for us?

A. We would have had to have charged less than $4.00—$3.50—in Seattle to break into that market.

Q. But you could have charged less, profitably; is that correct?

A. We—yes.

Q. And in the Spokane market, Mr. Rigby, you charged a price initially of $2.88. Now, at that price are you aware that that was the lowest price in the Spokane market at that time?

A. That was an f.o.b. Salt Lake plant price.

Q. Then when you add the freight, it comes up to what, about $3.10 or eight cents?

A. About $3.20—no, about $3.10, $3.12, something like that.

Q. The freight is around what, 30 cents?

A. About that.

Q. So then are you aware that that price f.o.b. Spokane was the lowest price then prevailing in that market?

A. No, I wasn't aware of that.

Q. If the Morton price was $3.34 in the Spokane market through 1961, that would not have affected, I take it, your business operations in Spokane, since you could sell there at $3.08 or 10 cents and make a profit, is that correct?

A. That was a private label.

[fol. 704] Q. I understand that, but does that change your conclusion?

A. It changes the price structure.

Q. You can sell a private label, as I understand it, profitably in the Spokane market at $3.08, or whatever it is?

A. Yes.

Q. And a Morton price of, say $3.34 or $3.50, or whatever it is the evidence shows, would not have impeded your profitable business operations in the Spokane market?

A. I might add, that 2.88 price was there just for a short time. The price was increased. The cherry and the boysenberry prices were higher, and he—weren't one price. They were higher than the apple price, which brought the average of the pies up, and that did not affect—or it did affect the over-all picture.

Q. Your apple pies for most of 1960 were $2.88, were they not?

A. No, sir, not most—

Mr. Alioto: The records show otherwise.

Mr. Schafer: I don't want to misrepresent anything. I thought I had the fact understood.

Mr. Alioto: Here are the invoices if you would like them.

By Mr. Schafer:

Q. Your first sale of apple in 1960 in Spokane, according to this exhibit, Mr. Rigby, was on February 29, 1960, and the price was $2.88.

A. Yes, sir.

Q. Is that correct? And then your last price—you sold through the following months, and then on August 22, 1960, you also sold at $2.89; does that comport with your recollection? In August.

A. It might have been about August we raised.

Q. Yes. And then according to this exhibit you raised the price to $3.00 later on in August, 1960.

A. If that is what the record shows.

Q. So that from February through August you were selling in the Spokane market at $2.88 plus the freight necessary to get the product up there?

A. Yes, sir.

Q. And any price higher than the price you were able to charge at profitably would not have impended your business operations, possible business operations, in the Spokane market, is that correct?

A. I don't exactly know what you mean.

Q. If you can sell in the Spokane market profitably at $3.08, or whatever the figure is, $3.10, a Morton price of $3.34 or $3.50 whatever it is the record shows, would not in any way impede your successful business operations in Spokane, isn't that correct?

A. Not on the private label, but on any other label it would.

[fol. 705] Q. But you could sell any other private label in the Spokane market, isn't that correct, at the same prices?

A. No, sir.

Q. Why not?

A. Because you have to take into consideration sales costs, advertising, promotions.

Q. Well, I don't understand you, Mr. Rigby. If you can sell the Sonny Boy private label profitably at $3.10, you could sell other private labels profitably at $3.10 also, couldn't you?

A. No, sir. Sonny Boy, they advertised their own pies, they sold their own pie, they promote their own pie.

Q. That is the way it is with all private labels, isn't it?

A. With a private label, yes. But under the Utah Pie label—

Q. I am talking about a private label. I am asking you whether or not it wouldn't have been possible to sell other private labels in the Spokane market in the same fashion you sold Sonny Boy.

A. Private labels, yes.

Q. And any price higher that is quoted by Morton would not impede the sale of private labels in the Spokane market?

A. Not on private label.

Q. In connection with Spokane, you testified you had spent two weeks traveling in Spokane, Seattle, and Portland, is that correct?

A. That is correct.

Q. When did that occur?

A. I believe it was—first part of 1961, January, February, something like that.

Q. And am I correct in understanding that you don't maintain any permanent sales force in any of those cities?

A. We had a broker represent us that lived in Portland.

Q. In Portland. But you didn't have anybody in Spokane?

A. He covered Spokane.

Q. I am talking about permanently located in Spokane.

A. No, sir.

Q. And nobody permanently located in Seattle?

A. No, sir.

Q. Am I correct in understanding that most of the competitors in the industry do have permanent representatives, to your knowledge, in these cities, in these major marketing areas?

A. I'm not aware of that.

Q. You don't know?

A. No.

Q. In the Denver market, Mr. Rigby, the evidence similarly shows—I won't go through it in detail—the evidence similarly shows that Morton was charging prices of $3.80 in 1960, $3.35, $3.44, et cetera. That is in Plaintiff's Exhibit 83 for identification and Plaintiff's Exhibit 80 for identification—charging prices of $3.65, et cetera.

[fol. 706] Now, am I correct also in understanding that where you can sell a private label pie here in Salt Lake City at $3.00 and make a profit, that you could get it over to Denver at, say, $3.20, isn't that correct?

A. Yes.

Q. And at $3.20, it would be a price significantly lower than the, say, $3.65?

A. If the price was 3.65.

Q. That's right. We are assuming that these exhibits show the Morton prices, as they were offered to show.

Now, then, a price of $3.65 would not, then, affect your profitable business operations, whatever they might be, in the Denver market, isn't that correct?

Mr. Alioto: Are you addressing that question to private labels again?

Mr. Schafer: Yes. If he can make a profit on making a pie.

Mr. Alioto: Are you talking about private labels?

Mr. Schafer: I am talking now about private labels.

Mr. Alioto: Okay.

A. We never sold private labels in Denver.

By Mr. Schafer:

Q. But you had pies that you made at a profit and sold at $3.00?

The Court: Well, then, you are not talking about private labels. He said he didn't sell any private labels in Denver.

Mr. Schafer: The question was, your Honor, whether or not the Morton price of $3.65 would restrict any possible private label sales that he might have been able to make.

A. We didn't make any private label sales in Denver.

By Mr. Schafer:

Q. Was the reason you didn't make any private label sales because Morton was charging $3.65?

A. We never tried to make any contact in private label sales in Denver.

Q. You never did?

A. Not on private label.

Q. I thought you sold Frost 'N' Flame in Denver in 1959.

A. That is not a private label in Denver—in Colorado.

Q. Did you advertise that in Denver?

A. Did we advertise it?

Q. Yes.

A. We didn't advertise it.

[fol. 707] Q. That was handled—the store advertised it, if anybody did, isn't that true?

A. That is true.

Q. And isn't that the way a private label works in terms of advertising?

A. Not always.

Q. That you don't advertise it and the store does?

A. That's right.

Q. Isn't that one of the distinguishing features of a private label?

A. It is part of it, but it doesn't always occur.

Q. Why didn't you sell any—you say you didn't try to sell any private label in Denver, is that your testimony?

A. We had two labels, Utah Pie and Frost 'N' Flame pie. In Colorado they are not private labels. The only place Frost 'N' Flame is a private label is in Idaho and Utah.

Q. My question was whether or not you tried to sell any private label pies in Denver.

A. Under those two labels or any other label?

Q. Any label.

A. We never—well, I will say this: At one time I called on Miller's Supermarket in Denver.

Q. Just tell me if you tried to sell any pie.

Mr. Alioto: That's what he is answering.

Mr. Schafer: He can say yes or no.

A. Yes. Yes and no. I would like to explain it.

By Mr. Schafer:

Q. All right.

A. Miller's Supermarket was making—they are a branch of National Tea, and I called on them about selling them a pie, and they said they had their own private label. And he told me that their private label was made in the Eastern part of the United States. And from what he told me I could see that our plant location was in a better position to ship to Denver than their private label. And I said, "Is there any possibility we could make your private label?"

He said, "You will have to contact our office in Chicago."

To that extent we tried to make a private label for National Tea for Miller Supermarkets in Denver.

Q. Was that the only effort you made to sell private label in Denver?

A. As I recall.

Q. Did you contact National Tea headquarters in Chicago?

A. No, not that I recall.

[fol. 708] Q. Private label, I take it, is profitable to your company.

A. Certainly.

Q. Mr. Rigby, if I understand it correctly, you haven't made any sales efforts in, say, the Los Angeles market?

A. Not to any extent.

Q. So that really the prices charged in the Los Anegeles market are immaterial, aren't they, to your business here in Salt Lake City and wherever you do try to compete?

Mr. Alioto: If your Honor please, if he means immaterial in law, that is a misstatement of the law. The price difference in Los Angeles and Salt Lake City is the heart of Section 2(a).

The Court: Sustained.

Mr. Schafer: I am asking him, not as a lawyer, your Honor, just as a businessman.

The Court: It is ambiguous, not understandable.

Mr. Schafer: May I try this, your Honor, may I ask him whether or not, Mr. Rigby, as a businessman, it is of significance to you what the competitive market prices are in the Los Angeles market?

A. It shouldn't make any difference.

By Mr. Schafer:

Q. Or in the San Francisco market?

A. No, sir.

Q. What affects you, I take it, is what the price is in the Salt Lake City market and in any other market in which you try to sell your products?

A. True.

Mr. Lamb: If your Honor please, may I interrupt and ask that the remark of counsel be stricken from the record; that the heart of 2(a) is the difference in price in Los Angeles and Salt Lake City.

The Court: Yes. That may be stricken. The jury is instructed to disregard it.

Mr. Lamb: I would like to have an instruction that that not be repeated, because it is not the heart of 2(a).

The Court: Let's not have an argument about it now. The jury is instructed to disregard it.

By Mr. Schafer:

Q. What, sir, were your efforts to make sales in the Portland market, about which we had testimony?

[fol. 709] A. I had a broker representing us in Portland.

Q. On a permanent basis?

A. We thought so.

Q. For how long?

A. Until things—until circumstances disrupted the program.

Q. The evidence shows, in Exhibit 88, Mr. Rigby, that the Morton price in Portland was, in 1959, $4.28. Now, that is a price at which, I take it, you could compete successfully.

A. In 1949—or '59.

Q. 1959. And in 1961 the evidence purports to show that the Morton pie was $4.06 on apple pies. That is a price, I take it, at which you could compete successfully in Portland?

A. We could compete—if Morton's price was $4.06 in Portland, we could compete with Morton.

Q. Right. Do you mean to imply that there might be other people in the Portland market with whom you couldn't compete?

A. Yes.

Q. How about in the Seattle market? Would there be people in the Seattle market other than Morton?

A. Other than Morton?

Q. Yes.

A. Morton, to my knowledge, was the strong factor—one of the strongest factors in the Seattle market.

Q. There were a number of other brands in the market, is that correct?

A. Oh, there were other brands, certainly.

Q. And Morton, so far as you know, I take it, could not charge a higher price than the other brands could charge?

A. I don't know.

Q. You don't know. If Morton's price—I'm sorry. I think we went through that. I take it, Mr. Rigby, that you don't claim that Morton acted in the Spokane market with any intent to injure or destroy you, is that correct?

A. I won't say that, no.

Q. I would like to refer you to Page 81 of your deposition, Mr. Rigby. Do you recall—

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[fol. 710] By Mr. Schafer:

Q. Do you recall, Mr. Rigby, that we had a deposition on that date?

A. I don't know whether it was that day or not. We have had a number of them.

Q. We have had a number of them. Now, my question to you, Mr. Rigby, was:

"Do you want to insist on your Spokane claims? Do you really think Morton, by pricing in Spokane to URM, was trying to destroy you?"

Can you identify, sir, what "URM" is before we go on?

A. I am not exactly sure what "URM" means. I know it is a wholesaler in Spokane. I think it is United Merchants—United Retail Merchants, I believe, I am not sure.

Q. It is one of the big buyers in the Spokane market?

A. Yes.

Q. And your answer to the question was;

"Not to—well, I will have to retract that, because you and I differ—

"Question: I am just trying to use the language of your complaint, Mr. Rigby, and it is alleged, an intent to destroy you. Now, I want to know what the instances are.

"Answer: Not in Spokane."

A. I don't really—

Mr. Alioto: Why don't you read on.

Mr. Schafer: I will be glad to. That was all I was interested in.

By Mr. Schafer:

Q. "Question: You will agree—

"Answer: They have taken business away from us, yes.

"Question: They haven't taken any business from you in Spokane, from Roundup, though, have they?

"Answer: Probably, yes.

[fol. 711] "Question: You don't even know if they sell to Roundup.

"Answer: Not—from the area.

"Question: But with respect to Roundup, you still have all the Roundup business on Sonny Boy, haven't you?

"Answer: I don't know what price they are selling and what different labels, I don't know. I know they are selling Sonny Boy and that is the only one I do know they are selling for a fact.

"Question: And Morton hasn't taken any of that Sonny Boy business?

"Answer: Yes. I think they have, yes.

"Question: But not—"

The Court: Are we going to read the whole works?

Mr. Schafer: One more question and answer, your Honor. I was invited to go on.

Mr. Alioto: I am going to object to this next question as calling for a legal conclusion. It is on Line 4. I object to the form of it.

Mr. Schafer: It is just asking what his claim is.

Mr. Alioto: Lines 4 to 6. I have an objection, Lines 4 to 6.

Mr. Schafer: This, your Honor, was in our attempt to figure out what the complaint meant.

The Court: Objection sustained.

By Mr. Schafer:

Q. Morton has not, in fact, taken any of the Sonny Boy private label business away from you in Spokane, have they, Mr. Rigby?

A. They don't make Sonny Boy, no.

Q. And you are still selling at a profit in Spokane, I take it, over the years involved?

A. Yes, sir.

Q. And you didn't know what Morton's prices were in Spokane, did you?

A. Not in Spokane.

Q. And you have made several price increases on the Sonny Boy label, isn't that correct?

A. We have made some. I won't say—

[fol. 712] Q. Haven't you moved from 2.88 to $3.00 and then to $3.10?

A. That is two.

Q. Two price increases in the Spokane market, is that right?

A. On apple pies.

Q. Now, you said to us that the Spokane price was $2.88 f.o.b. Salt Lake City?

A. Yes, sir.

Q. And that was in February, I think the record shows of 1960?

A. Yes, sir.

Q. And isn't it true, Mr. Rigby, that in February of 1960 on your Utah label you were selling Utah label in February of 1960 for about $3.70 here in Salt Lake City?

A. It is possible. I don't recall.

Q. Well, 3.60 or 3.70?

A. 3.60, 3.70, 3.50, something in that neighborhood.

Q. In that neighborhood?

A. Yes, sir.

Q. So you would be selling, in February of 1960, and throughout the Sonny Boy period, at a higher price here in Salt Lake City than you were selling for delivery in Spokane, isn't that correct?

A. Our price was higher here than there, yes, if that is what you mean.

Q. Yes, that's right. And that was an f.o.b. Salt Lake City price?

A. Yes, sir.

Q. We have had a good deal of testimony in this record, Mr. Rigby, with respect to the Morton situation where it offered a price of $2.55 to buyers if they would pick the product up in California. And my question to you is: In your view as a businessman isn't the Morton f.o.b. price quotation similar to the f.o.b. price quotation that you made on Sonny Boy?

A. No, sir.

Q. Why is there a difference?

A. Sonny Boy is a private label.

Q. Why does that make a difference?

A. There is difference in costs involved.

Q. How does that affect—I am talking about price now, Mr. Rigby.

Mr. Alioto: That is what he is talking about, too.

By Mr. Schafer:

Q. Do you mean the price by cost?

A. There is a difference, that it has to go into the actual sale of the pie.

Q. I am talking about price, Mr. Rigby, and I am wondering whether or not it isn't true that the effect, in terms of price, that the effect of the Sonny Boy f.o.b. price quotation in the Spokane market would be the same as whatever effect there might be of the Morton f.o.b. price quotation in any markets in which that was available.

A. I don't think so.

[fol. 713] Q. As a matter of price.

A. I don't think so.

Q. Could you tell us why you don't think so.

A. Sonny Boy is a private label.

Q. I don't understand how that makes any difference.

Mr. Alioto: If your Honor please, he is arguing with the witness. It seems to me the difference is obvious, but he is arguing with him now.

The Court: Yes.

Mr. Schafer: I am not arguing. I am just trying to get an amplification.

Mr. Alioto: Just ask him for the facts.

The Court: It is argumentative.

By Mr. Schafer:

Q. What are the facts, Mr. Rigby, that make up a difference in terms of price, competitive effect upon price of a private label as against a different label, a Utah label?

A. There's a lot of things that go into consideration in the difference in price. First of all is selling costs, advertising, promotions.

Q. Maybe I am not making myself clear. I don't mean to cut you off. I am not interested in the cost factors, Mr. Rigby, to the manufacturer. I am interested in the effect in the market place of the price quoted. Maybe I can try it this way: Wouldn't the effect to the Spokane competitors of your 2.88 f.o.b. price quotation, whether it is private label or not, be substantially similar to whatever effect there might be of a Morton f.o.b. price quotation in whatever areas that might be available?

A. I still say "no".

Q. Do you claim that the private label doesn't compete with the other labels?

A. Sure it competes.

Q. So that you have a price in Spokane of $3.08 laid down in Spokane, is that approximately right?

A. Approximately.

Q. And that is a product being bought by somebody in Spokane at $3.08, and that product is competitive with the other brands being offered in the Spokane market, isn't that correct?

A. The apple pie, yes.

Q. I am talking about apple pie. So they are all in competition in Spokane?

[fol. 714] A. They are in competition, right. But to my knowledge Roundup Wholesale Groceries have never sold the Sonny Boy pies for less than three for a dollar.

Q. I will accept that. I don't know.

A. So they would be competing with a three-for-a-dollar pie, and everybody had three-for-a-dollar pies in Spokane.

Q. Starting in February, 1960?

A. I would think so, yes.

Q. You don't know?

A. I won't say everybody. There were some.

Q. You don't know.

A. No, I don't.

Q. But in Spokane, among competitors in Spokane, the important consideration was: What is the price at which a purchaser is getting the pies in Spokane, isn't that correct?

A. Not necessarily.

Q. You mean—you don't claim the price is not material?

A. Oh, it is material—it is material to him, sure. It depends on how much profit he can make in the resale.

Q. But you know whether or not, Mr. Rigby, the customers in Spokane—of the manufacturers—I'm talking about thes distributors—do you know whether or not they are concerned with the manufacturers' cost of production, or are they concerned with the price at which they're going to get the product?

A. They're concerned with the price at which they're going to buy the product.

Q. Isn't that what people are concerned about in Salt Lake City also?

A. Would you repeat the question, please?

The Court: Well, that's a long way around, now, to go back and repeat all of that.

Mr. Schafer: Can we read the question back?

The Court: Why don't you approach it again?

By Mr. Schafer:

Q. Well, isn't a fact, then, that the customers in Salt Lake City, Mr. Rigby, of the manufacturers are concerned with what their price is in Salt Lake City, the price at which they purchased the product? Isn't that correct?

A. Sure.

Q. That they aren't concerned with what it costs to the manufacturer? Isn't that correct?

A. They are not concerned, you say?

The Court: Of course, I think this whole line of interrogation is asking for a conclusion. You are asking this man to tell you whether or not in the mind of another there is a concern.

[fol. 715] Mr. Schafer: I started off by asking if he knew; and if he doesn't know, of course, that's the answer to that.

The Witness: I would think so, but I don't know. I would think there would be some concern, but—

By Mr. Schafer:

Q. As a businessman here, Mr. Rigby, competing in the Salt Lake City market, you yourself are concerned, are you not, with what the prices are here in Salt Lake City of the manufacturers with whom you compete?

A. What the wholesalers can buy them for?

Q. Yes.

A. Sure.

Q. And that is the significant consideration for you in terms of how successful you compete in the Salt Lake City market?

A. It has some effect on it.

Q. Well, I don't understand that qualification. Why would anything else have an effect? Isn't it price, and price only?

A. No, I don't think it's price, and price only.

Q. What else is it?

A. I think it's quality.

Q. Well, I didn't mean to discount quality or brand franchise or any of those other considerations; but your cost, the cost at what, say, Johnston Pies manufactures its pies and sells them here in Salt Lake City is not a material consideration to you? What you care about is their price; isn't that right?

A. Yes, sir.

Q. And the same would be true of Morton or Pet or anybody else; isn't that right?

A. Yes, sir.

Q. Now, we had some trouble yesterday, Mr. Rigby, with the definition of a "trading area." I wonder perhaps if we can get some amplification of that. As I understand your

analysis of the question—and you correct me if I'm wrong—you define a trading area as being the entire area in which you have sold or tried to sell; is that correct?

A. I would think so, yes.

Q. And don't you agree that within that trading area, Mr. Rigby, there are a number of different retail marketing areas?

A. Yes, sir.

Q. And those retail marketing areas are competitive pricewise on the retail level; isn't that right?

A. Yes, sir.

Q. And the price at retail, isn't it true, is largely determined by what the manufacturer's price is to the wholesaler or to the direct buying chain?

A. Yes, sir.

Q. So that manufacturers competing in an area where retail price is competitive have to compete with each other in terms of quoting a price which will permit the passing on of the retail price which is competitive; is that correct?

A. Yes, sir.

[fol. 716] Q. And isn't it correct, Mr. Rigby, that in the various large cities in this western area, you have a different makeup of the competition—you have different brands, say, competing in the different markets; isn't that correct?

A. Mostly they're all about the same. In some markets you might have one or two that's not in other markets, but your major labels are in all—in all the markets.

Q. Right, but in, say, Los Angeles do you know whether or not, say, the County Fair is an active competitor in Los Angeles?

A. Yes, they're active in Los Angeles.

Q. And they don't compete in Salt Lake City, do they?

A. Yes, sir.

Q. They do compete? They do not compete?

A. They sell pies in Salt Lake City.

Q. Do they? I did not know they did. You have different buyers in the various markets, don't you?

A. Yes, sir.

Q. And you sell to a buyer in Salt Lake City, and that doesn't get you any business in Seattle; isn't that correct?

A. No, sir.

Q. Did you ever, Mr. Rigby, change a price quotation in Salt Lake City because of a Seattle price change, for instance?

A. No, sir.

Q. There isn't any relationship, is there, between the prices quoted in the two markets?

A. No, sir.

Q. And retailers, I'm sure I'm correct in understanding, that retailers don't compete from one city to the next?

A. Not outside of their own area.

Q. Now, Mr. Rigby, Page 1181 of the transcript of this trial, you testified that you had a declining price pattern through these years involved; is that correct?

A. Yes, sir.

Q. And do you recall that you testified that in 1958 you were forced from a $4.15 price to a $4.00 price? Do you recall that?

A. Yes, sir.

Q. Now, my question to you, sir, is who forced you to lower your price from the $4.15 to $4.00, if you know?

A. If I know?

Q. Yes?

A. To my recollection, it was Carnation.

Q. And what price quotation was that?

A. I don't recall their exact price.

Q. And was Carnation the only competitor in the market in 1958?

A. No, sir.

Q. How do you know that Carnation's price was the price that forced you from $4.15 to $4.00?

A. I said, as I recall, it was Carnation. There were—Pet was active here, very active, Carnation was very active, Continental was here, among others.

[fol. 717] Q. Well, Continental wasn't here very much, were they, sir, in 1958? Could you just refer yourself briefly to Morton's Exhibit 21. And you recall that's been introduced in evidence and shows Morton's volume in 1958?

A. That's what it says.

Q. Not very active, were they?

The Court: Now, that's argumentative.

By Mr. Schafer:

Q. Is it your testimony that Morton's price in 1958, sir, would have had any effect in forcing you from $4.15 to $4.00?

A. It might have.

Q. You don't remember any price?

A. Not actual prices, no, sir.

Q. And you're just guessing at that?

A. Just guessing at what?

Q. That Morton's price or Pet's price might have had an effect in forcing you down in price?

A. No, I'm not guessing.

Q. Do you know that they did?

A. It was one of them, or all of them. I don't recall the exact price.

Q. And they were the only competitors in the market?

A. No, sir, they were not the only competitors.

Q. There were other competitors?

A. Yes, sir.

Q. And you can't recall the prices of any of the competitors?

A. Exact prices, no, sir.

Q. And is your testimony the same in respect of being forced from $4.00 to $3.70?

A. Yes, sir.

Q. And you can't remember any of the prices there involved?

A. No, sir.

Q. And there were various other competitors in the market?

A. Yes, there were some, but none were very strong. In and out, in and out.

Q. This was in 1959, was it not, sir?

A. Yes, sir.

Q. Now, in 1959 Morton wasn't very strong, were they?

A. Not according to the chart.

Q. The chart is accurate, isn't it?

A. That I couldn't say.

Q. Now, Mr. Rigby, you claim that in 1961 you were forced to lower your price to $2.75; is that correct?

A. Yes, sir.

Q. And that's really what this complaint is all about, isn't it?

Mr. Alioto: Now, if your Honor please, that characterizes the complaint again—

The Court: Sustained.

[fol. 718] By Mr. Schafer:

Q. Now, I should like to read briefly from Page 60 and 61 of your deposition, Mr. Rigby.

Mr. Alioto: May I see what you're going to read, counsel, please? This is the deposition at what page? The June deposition of the three you took? What page?

Mr. Schafer: 60.

Mr. Alioto: What do you plan to read?

Mr. Schafer: All I care about are, but it's a little bit out of context, is here (indicating).

Mr. Alioto: Now, if your Honor please, here again, I'd like to hand the Court these questions he's talking about. He's speaking of claims and the complaint. On a discovery situation it might be all right, but certainly at this juncture do not elicit facts.

Mr. Schafer: May I state something, your Honor?

(The Court examines.)

Mr. Schafer: May I state something?

The Court: Yes.

Mr. Schafer: Mr. Rigby here is the only salesman for the corporation involved as the plaintiff in this lawsuit; and he has been the spokesman for the corporation in this lawsuit; and I think I'm correct in understanding that he was the person who was first concerned about these alleged violations that he's claiming here and that he communicated the information upon which he felt he had been injured. And it seems to me that it's perfectly competent for us to ask him what the information was, what the events were, that caused him to think he could—

The Court: Well, that's a horse of another color.

Mr. Alioto: That's different. Sure. I have no objection to that question, to ask him what events may have triggered the complaint. To say that's the only thing in the complaint, when you can read the complaint, and says it isn't. I have no objection to that.

[fol. 719] By Mr. Schafer:

Q. Wasn't this complaint, Mr. Rigby, triggered by Morton's price cut in 1961 from $2.85?

A. It had an effect on it, yes.

Q. And isn't that the only price reduction which you were concerned with?

A. No, sir.

Q. Isn't that what you testified to in your deposition?

A. I don't recall what I testified to in my deposition.

The Court: That isn't what I just read.

Mr. Schafer: Well, may I read it, so the jury can make their decision—

The Court: No, you may not read it so the jury can make its judgment on that question, because I think that's an improper question.

By Mr. Schafer:

Q. What other price reductions were there Mr. Rigby, by Morton that you claim injured you in any way?

A. By Morton?

Q. Yes.

A. The only thing I can say to this question is that I knew that the defendant companies were charging less for their pies in Salt Lake City than they were in California, where their plants were located. I took this information to our attorney, told him of these events, and we looked over the situation, and he took it from there.

Q. You say you knew that the defendant corporations were continually and regularly charging less here than in California?

A. I didn't say that. I said I knew they were charging less in Salt Lake City than in California. I didn't say regularly or continually. I said they were at times. Now, just how regular and how continuous I couldn't say.

Q. But so far as you knew, it wasn't regular or continuous; is that right?

The Court: He says he doesn't know.

By Mr. Schafer:

Q. As far as the prices that you say injured you in the Salt Lake City market, Mr. Rigby, am I correct in understanding they were just sporadic prices?

A. That I don't know if they were or not.

Q. Now, what other prices of Morton, other than the June, 1961, price, what other price do you claim had an impact upon you here in Salt Lake City during the years involved?

[fol. 720] Mr. Alioto: If your Honor please, what prices had an impact is a legal conclusion in terms of the antitrust laws. He can elicit facts.

Mr. Schafer: I don't mean to include an impact in any legal connotation, your Honor. I just mean—

The Court: Well, rephrase the question.

By Mr. Schafer:

Q. What other price, Mr. Rigby, other than the June, 1961, price, what other price do you think caused you to lose any business in the Salt Lake City market to Morton?

A. I have none that sticks out in my mind as fresh as that price in June or July of 1961. As I recall, there were others, but the exact prices I don't remember.

Q. Looking, if you will, briefly, Mr. Rigby, at the chart that's been introduced as Morton's Exhibit 21, would any of these sales here by Morton, do you claim that any of those were at a price that was on the—that injured you in your business here in Salt Lake City?

A. I would say some of them injured us, yes.

Q. On the theory that any sale made by Morton injures you?

A. They injured us—the sales by Morton that were sold below their California prices injured us.

Q. Because they took business away from you; is that your claim?

A. They took business away from us because they sold lower in Salt Lake City than they did in California where they were manufacturing.

Q. Now, looking here in November of 1960, Mr. Rigby, do you know as a fact whether or not Morton was charging less here than in California?

A. At that particular time?

Q. Yes.

A. I don't know.

Q. And how about in May of 1960, where the previous sale was?

A. I don't know.

Q. Or how about in 1959, in August or—April or February?

A. I don't know.

Q. So you don't know whether or not those sales that Morton made were at a price higher or lower than the prices charged in California?

A. That's true.

Q. And you claim that the price charged in June of 1961, you claim that was lower than the price charged in California?

A. I claim that, yes.

Q. Is that on a net basis or on an invoice list basis?

Mr. Lamb: If your Honor please, may we ask for a brief recess?

[fol. 721] The Court: So you fellows can talk it over?

Mr. Lamb: Well, one of the great difficulties in trying to coordinate a case, your Honor, in accordance with your wishes, is to try not to interfere; and I think a brief recess might be in aid of expediting matters.

The Court: Very well. We'll have a brief recess. Ladies and gentlemen, don't talk about the case. And you stay out until I send the Marshal after you. You don't need to stay around in that room, you know.

(Recess.)

The Court: All right. Come up here, Mr. Rigby.

By Mr. Schafer:

Q. Mr. Rigby, in connection with your testimony that you—

The Court: How much more of this have you got?

Mr. Schafer: Of the cross examination, your Honor?

The Court: Yes.

Mr. Schafer: I would say quite a lot. May I go on?

The Court: Yes.

By Mr. Schafer:

Q. In connection with your testimony, Mr. Rigby, of being forced in 1958 to lower your price from $4.15 to $4.00—

A. Yes, sir.

Q. —would you look at this I.B.M. run which is in evidence, and bears the date of about April 28, 1958, accurately reflect the time at which you decreased your price from $4.15 to $4.00?

A. About then, yes.

Q. Yes. Now, you testified that that price reduction was forced on your by Carnation Company; is that correct?

A. That's one.

Q. And there are others forced you? Is that right?

A. At that particular—

The Court: He went all over that with you before we took the recess, and I don't see any sense in repeating it.

Mr. Schafer: I'd just like to show—

[fol. 722] The Court: We're not going to get anywhere in this lawsuit if we keep repeating the testimony over and over and over again. You repeat it, you ask him to repeat it.

By Mr. Schafer:

Q. I'd just like to show you the chart that's in evidence, Mr. Rigby, respecting the apple pie prices in Salt Lake City of the four parties to this action for 1958 and ask you if that doesn't indicate that you decreased the Utah label price at a time when there was no decrease in price by the three defendant companies.

Mr. Alioto: If your Honor please, that's obviously argumentative to talk to him about this chart, because this chart is not predicated upon prices paid by anybody. They're just offered prices and price lists, and not specific deals. In any event, it's improper to compare exhibits. It seems to me he should ask him about the facts on it. We would object on that ground.

The Court: Sustained.

By Mr. Schafer:

Q. Am I correct in understanding, Mr. Rigby, that offering prices have an effect upon the selling price that you can get for your products?

A. The offering prices have an effect?

Q. Yes. Offering prices of the other manufacturers.

A. Definitely.

Q. Do you know of any reason to believe that a manufacturer can get a higher price than the public offering price?

The Court: That is—

Mr. Alioto: I'll object, if your Honor please, on the grounds it's argumentative and asks for conclusions things that aren't material.

Mr. Schafer: I submit it's not either of those, your Honor.

The Court: Well, I submit you're asking for an elaboration of the obvious. On that ground, I suggest that you pursue the facts.

Mr. Schafer: May I state why I asked the obvious question, your Honor?

The Court: No. Pursue it.

[fol. 723] Mr. Schafer: All right. All right. I do have a reason. I hope you understand that.

The Court: I don't understand asking for an obvious thing.

Mr. Schafer: I have a reason.

The Court: Why don't you ask him to state the facts about what you want to know?

By Mr. Schafer:

Q. You testified, Mr. Rigby, that the prices charged in California do not have any effect upon your business; is that correct?

Mr. Alioto: In California.

By Mr. Schafer:

Q. In California.

A. That's true.

Q. Now, how did, then a price charged by Morton in 1961 in California have anything to do with your business in Salt Lake City?

A. How did it have any effect on us?

Q. Yes.

A. As I stated before, the effect was that—not the effect, but my knowledge was that their prices were higher in California than they were here, where we were competing. In our area, where we manufacture our pies, they were much lower here than in the same area where you manufactured your pies, or the defendants manufactured their pies. They were higher in their own state than they were in a state 600 miles away.

Q. Yes. I understand your claim. My question to you was whether or not it isn't true, that the only price charged by Morton that concerns you in getting business or in holding business is the price in Salt Lake City.

A. That's true.

Q. And the price in California doesn't have anything to do with that, does it?

A. That's true.

Q. So that the difference, if there is any difference between the California price and the Salt Lake City price, is not important to you in terms of getting business in Salt Lake City?

A. Not in terms of getting business.

Q. Or in maintaining your price or anything else?

A. No.

Q. What concerns you is the actual offering price in Salt Lake City? Isn't that correct?

A. True.

Q. Now, Mr. Rigby, there have been over the years that were involved in this action a considerable number of brands competing in the Salt Lake City market; isn't that correct?

A. Several, yes.

Q. Could you identify them for us, please, briefly?

[fol. 724] The Court: No. That's been done and done and done in this record. I don't see a bit of sense in your pursuing that.

Mr. Schafer: The question, sir, was whether or not he competed—

The Court: I understand what the question is; and this record is replete with the answers.

Mr. Schafer: My only difficulty, sir, was whether or not he felt he competed with those brands.

The Court: Well, ask him if he competed.

By Mr. Schafer:

Q. Did you compete during these years, Mr. Rigby, with all of the brands that have been identified as being the brands that competed in the Salt Lake City market?

A. We sold pies here along with the rest of them, yes, sir.

Q. And by that you mean you competed with them for the business?

A. Yes.

Q. And these pies come in various sizes and weights; isn't that correct?

A. That's true.

Q. And isn't it correct that the smaller pies are generally priced at less than the larger pies?

A. Generally.

Q. And isn't it true that you've stated that competition takes the form of both price and weight differences? Isn't that correct?

A. Would you explain that in another manner?

Q. Well, frankly, sir, I was just taking a statement you made in one of your depositions. The competition between the brands is both in the terms of the price that the brand was offered at and also in terms of the weight, the size differences in the various brands; isn't that correct?

A. Yes, sir.

Q. And here in Salt Lake City we have only, I think we are clear, about four customers in the market; isn't that correct?

A. Wholesalers? Yes, sir.

Q. They are the major customers?

A. Yes, sir.

Q. They do about what? 90 per cent of the business?

The Court: That's all over the record, from the first day until this moment.

Mr. Schafer: I agree with that, your Honor.

The Court: Well, what's the use of cross examining him on that subject? Just repetitious—

[fol. 725] Mr. Schafer: He, of course, is the plaintiff's spokesman.

The Court: Now, now, now, never mind about that. Mr. Reporter, read that question back to him.

(Question read.)

The Court: Now, that's got nothing to do with anything except what you asked him. I don't want any comment on it. Just don't be cross examining on stuff that has been established here beyond any peradventure of a doubt, anything that you want to know from the witness, anyhow. Now, you've got somehow to shorten up this affair; and one place to do it is in your cross examination. Better cross examination, anyhow. You get down to the point, drive it home. Go ahead.

By Mr. Schafer:

Q. The price competition which you meet Mr. Rigby, in the market is price competition evidenced by these spot deals, is that correct, these short-term promotional allowances and temporary price reductions, is that correct?

A. I don't understand what you mean.

Q. Don't the manufacturers with whom you compete in the Salt Lake market compete by offering short-term promotional offers or allowances, or short-term price reductions?

A. That is one way of doing it, yes.

Q. And there is quite a lot of that, isn't there?

A. Yes, sir.

Q. And they come and they go?

A. Yes, sir.

Q. And sometimes people ride those out and sometimes they respond to them, isn't that right?

A. That's true.

Q. And sometimes you ride them out?

A. Sometimes.

Q. And sometimes you respond to them?

A. Yes, sir.

Q. And any short-term price reductions or promotional offers offered by either Morton or Pet or Carnation would not be peculiar to the industry?

A. May not be peculiar, but has some effect.

Q. Oh, it surely has an effect, but they aren't the only companies that do this, are they?

A. I wouldn't think so. I don't know.

Q. Morton hasn't been a price leader in the market, have they, Salt Lake market?

A. Did you say they haven't been?

Q. Have not been.

A. A price leader?

Q. Yes.

A. I would think so.

Q. You think they have?

A. Yes, sir.

Q. I am talking about over the years 1958, 1959, 1960, 1961.

A. I would say they have been a price leader.

[fol. 726] Q. On the volume we see evidenced by Morton's No. 21?

A. Yes.

Q. Now, in 1958, Mr. Rigby, how could they possibly have been a price leader?

A. I didn't say in all the years. I said in some of those years they have been a price leader.

Q. Can Morton set the price?

A. Morton's price can have a great deal of effect on the market, yes, sir.

Q. Any more effect than anybody else's price?

A. Could—no, sir—well—

Q. It really couldn't could it?

A. Could and could not.

Q. How could it have more effect than anybody else's? Will you explain that for the jury.

A. Brand franchise. The name "Morton" is a name that is known here. A name that nobody ever heard of, it may not affect the market as well as Morton's price.

Q. I thought you testified earlier on your deposition—I will read it to you, if you like.

Mr. Schafer: Page 169, counsel.

By Mr. Schafer:

Q. Isn't it true that Morton has not had what we call a brand franchise in the market, Mr. Rigby?

A. Their name is known here. Morton's name is well-known. In fact, for an example, on every Continental Baking truck I have ever seen it has a big sign on the side, "Morton Frozen Foods." I mean, people just can't drive down the street and not notice that sign on the side of these trucks, so the Morton name is known here.

Q. Known more than the Utah name?

A. No, sir, I wouldn't think so.

Mr. Schafer: May I read without objection from 169, just this question and answer here.

Mr. Alioto: If your Honor please, if this is offered to impeach him, I submit it is not impeachment. He was asked whether the Morton price could affect the market and be a price leader. Now he is trying to read this section, and I don't see that it impeaches anything, if that is what it is offered for.

Mr. Schafer: I understood the witness to say Morton had a brand franchise in the market.

Mr. Alioto: He didn't say that. He said the Morton brand is well-known. That is not a brand franchise, as you know, counsel.

[fol. 727] Mr. Schafer: I misunderstood his testimony then. I thought he said it had a brand franchise that made Morton's price more significant than anybody else's.

Mr. Alioto: He didn't say Morton had a brand franchise.

By Mr. Schafer:

Q. Didn't you say, Mr. Rigby, that the Morton price would be more significant than another competitor's price because of the Morton name?

Mr. Alioto: That isn't a brand franchise, if your Honor please. Go ahead, let him answer that question.

By Mr. Schafer:

Q. Was that your testimony?

The Court: I didn't hear the word "significant." Why don't you forget it.

Mr. Schafer: I would like to pursue it if I might, your Honor.

The Court: Well, start over.

By Mr. Schafer:

Q. Now, Mr. Rigby, I think you have testified, am I not correct, that a Morton price would have more effect, or might have more effect, than somebody else's price?

A. Yes, sir, it would.

Q. The question is why?

A. The Morton name is—could be better known than Joe Doak's pie from anyplace else that come in here. Morton's price would have more effect on the market than Joe Doak's pie, or whatever—

Q. I don't mean to reduce it to an absurdity. I was thinking in terms of Morton vis a vis Utah vis a vis Frost 'N' Flame—

The Court: I'll bet the witness doesn't know what vis a vis means.

By Mr. Schafer:

Q. Simple Simon, Pet-Ritz, or any of the other names that we are familiar with. I am not talking about Joe Doaks, but in terms of the names we are familiar with, that you are familiar with, in the day-to-day competition in the market, is it your testimony that Morton's price would have more impact on the market than somebody else's price?

[fol. 728] A. It may not have any more impact on the market than the defendants' or the plaintiff's, I will agree with—

Q. How about Mary Elizabeth?

A. I think it would have more effect on the market than Mary Elizabeth.

Q. The Utah label has a recognizable franchise, doesn't it?

A. It has a recognizable name.

Mr. Alioto: Excuse me, I don't understand the definition of "franchise" in that sense, if your Honor please.

The Court: Why don't you—can't you get at this without talking about the word "franchise"?

Mr. Schafer: Well, I will try to.

The Court: You are in trouble.

Mr. Schafer: I thought the witness understood me.

By Mr. Schafer:

Q. Does the Utah label—does that name, sir, give you some competitive advantage, in your judgment?

A. The Utah name is well-known.

Q. That's right. So it therefore gives you a competitive advantage, doesn't it?

A. I wouldn't think so.

Q. Oh, really? Does it not identify you with the locality?

A. In that respect, yes, sir.

Q. And isn't that an advantage competitively?

A. To some degree.

Q. Wouldn't people naturally tend to, or want to, support, or don't you think they want to support a local concern?

A. Some people would and some people wouldn't. To some people it wouldn't make any difference.

Q. You don't think the Utah label gives you a competitive advantage?

Mr. Alioto: He has already testified to the extent it does, and you are simply repeating now.

By Mr. Schafer:

Q. My question is: Why do you elect to carry the name Utah, if it doesn't give you an advantage?

A. That is the name we started out with 30-some-odd years ago and we have just stayed with that name.

[fol. 729] Q. You have been developing that name through advertising, et cetera, for 30 years, haven't you?

A. Yes, sir.

Q. And so there is some consumer recognition of the name, isn't there?

A. To a certain degree.

Q. And somebody comes in from outside with a name not well-known, and they are at a disadvantage as against the Utah name, isn't that true?

A. Not entirely, no.

Q. But somewhat?

A. Possibly.

Q. Now, what other advantages did you have? Isn't the fact that you can deliver in small quantities a competitive advantage to you over the other companies competitively in this market?

A. It may have some advantage.

Q. Doesn't it, as a fact, have some advantage, Mr. Rigby?

A. It has an advantage. That is why we are located here. That is why we are selling—we enjoy a fairly good business here.

Q. Surely.

A. Because of our advantage in freight, yes.

Q. That is one of them. I am not talking about freight savings, but the fact that you can deliver in small quantities.

A. Possibly.

Q. And that is very important to a big buyer like Safeway, isn't it?

A. I will not agree with that 100 per cent.

Q. Isn't it a fact, Mr. Rigby, that you have from time to time asked Safeway to take its orders in larger quantities, and they have either refused or objected on the ground that they didn't have storage facilities and on the grounds it would cost them more money?

A. They have said that, yes, but I still disagree, for this reason—

Q. I don't want you to disagree with what Safeway's reasons were.

Mr. Alioto: He is disagreeing with what you said.

Mr. Schafer: Do you want him to disagree? I don't really care.

By Mr. Schafer:

Q. But I don't think you know what Safeway's reasons were.

A. They stated to me what their reasons were.

Q. Why they didn't want to take in larger quantities?

A. Yes, sir.

Q. Go ahead and say it.

A. They said they didn't have the room for one thing.

Q. That's right.

A. But, in turn—

[fol. 730] The Court: Now, where did we get with that exchange?

Mr. Schafer: That is exactly the point I was trying to make, your Honor, that it is a significant advantage to be

able to deliver in small quantities, because Safeway doesn't have the room for a large quantity.

By Mr. Schafer:

Q. Isn't that right?

A. But if a store is going to put on a promotion or an ad, he can go through a semi-load of pies in two days or one day.

I recall back in 1958 when there was a price—'57, excuse me, before we even got into the pie business. There was a price war here in Salt Lake City. Associated Foods, they had a little warehouse out here by the airport, and they would go through at least one semi or a semi and a half every single day, of pies, so buying in small quantities does not have any great deal of significance to me, because they can sell them out and not even have to put them in their warehouse.

Q. Well, they can sell them out if they have what you call a "hot price"?

A. Even an average price it is done. They will sell 24, 25-3,000 cases of pies in a single day.

Q. In spite of that they objected to taking 3,000 pies?

A. Yes, sir, they did.

Q. Now, generally speaking here in the market, Mr. Rigby, everybody competes with everybody else for the business of a few pies, isn't that right?

A. That is true.

Q. And nobody has any particular bind on any customer, isn't that correct.

A. I wouldn't exactly say that. I think Bel Air has a bind on Safeway.

Q. How about in connection with the Frost 'N' Flame, Mr. Rigby? Don't you have a bind on that business?

A. No, sir, we don't.

Q. Don't you own that name?

A. We own the name, but we don't own the business.

Q. But hasn't Associated been advertising and supporting that brand name for about three years?

A. They have advertised it, yes, sir.

Q. And that pretty much induces them to stay with that name, doesn't it?

A. They have gone to others at times.

Q. But in terms of Frost 'N' Flame, Mr. Rigby, they have never gone to anybody else, have they?

A. Yes, sir.

Q. They have?

A. They sold other pies.

Q. They have never bought Frost 'N' Flame brand pies from anybody but you?

A. No, sir.

[fol. 731] Q. And they can't?

A. No, sir.

Q. And they have a substantial investment built up over the years in that name, haven't they?

A. Yes, sir.

Q. Wouldn't it be your judgment that that would serve to induce them to stay with the Utah Pie Company in connection with that brand name?

A. Not entirely, sir.

Q. Not entirely. I don't mean entirely, but in terms of the Frost 'N' Flame brand name.

Mr. Alioto: This is getting argumentative.

The Court: Yes, it is certainly argumentative. It is a complete argument.

Mr. Schafer: It is his distinction. That is the trouble I have with it.

The Court: Nothing else in it but argument. Sustained.

By Mr. Schafer:

Q. Now, when you came into the market in 1957, the other three defendants were in the market already, weren't they?

A. Yes, sir.

Q. And they had been in here for a couple of years, isn't that right?

A. More or less. I don't know the exact.

Q. Working and developing the market?

A. Yes, sir.

Q. And you came in and had initial success, didn't you, right away?

A. We got business right away, yes, sir.

Q. And Morton wasn't very significant in those early years, was it?

A. They sold an awful lot of pies here in 1958, to my recollection.

Q. Don't your data offered in evidence, Mr. Rigby, show that you had something like 70 per cent of the market in 1958 and Morton had one per cent?

A. That's what the record shows.

Q. Do you think that is a significant part of the market for Morton?

A. I will rephrase it, restate my answer. In 1957 Morton sold a lot of pies in this market.

Q. That was before you came in?

A. We was in business in 1957.

Q. Well, you came in late in 1957, didn't you?

The Court: That is argumentative.

By Mr. Schafer:

Q. You said you wanted to rephrase your answer, so go ahead and rephrase it.

[fol. 732] The Court: He did.

Mr. Schafer: We were talking about 1957.

The Court: He has already done it.

By Mr. Schafer:

Q. You were talking about 1958, weren't you, Mr. Rigby?

A. Morton sold a lot of pies here in 1957. We went into business in August of 1957. We had five months in 1957.

They sold a lot of pies. We sold a considerable amount of pies. I don't know how many. It wasn't very significant in total of what everybody else sold.

In 1958, in the beginning of '58, Morton, to my recollection, sold a lot of pies in this market, yes, sir, they did.

Q. In 1958?

A. To my recollection, yes, sir.

Q. Is that shown by the chart that we have there, Morton's Exhibit 21?

Mr. Alioto: If your Honor please, what the chart shows, it shows.

Mr. Schafer: I wonder if that refreshes his recollection that it is not true, your Honor. I just wonder if that refreshes his recollection.

The Court: Why don't you examine the witness and leave the chart alone. You can tell the jury anything you want to about that chart, and you have it sitting right there so they are looking at it. Ask the witness whatever you want. State the facts.

By Mr. Schafer:

Q. Do you know, Mr. Rigby, of your own knowledge, that the total market for fruit pies here has been increasing substantially?

A. Yes, sir, it has.

Q. Now, have you ever had, Mr. Rigby, any permanent sales representatives in the Denver market over these years?

A. Permanent?

Q. Yes.

A. No, sir.

Q. And, in the Spokane market? I think you said you didn't.

A. No, sir.

Q. Or northern Seattle market?

A. No, sir.

Q. And you are pretty much a one-man sales force for the company, aren't you, sir?

A. Yes, sir.

[fol. 733] Q. Do you know whether or not, say, in the Denver market most of the competitors have salesmen permanently located in the market making contacts daily, or almost daily, on all the customers, trying to make sales?

A. I don't know that.

Q. You don't know?

A. No, sir.

Q. Now, in respect, Mr. Rigby, to your private label business, which you were talking about earlier, you started out, I take it, in February of 1960 with the AG Stores?

A. I think it was about that time.

Q. And that was the first private label offered in the business?

A. Pardon me. What was that you said?

Q. February, 1960. Haven't I got that right? Is that right?

A. I think so. I am not sure.

Q. Was that the first private label to come into the market, do you know?

A. I don't know. I don't recall the exact date that Bel Air came in.

Q. Now, Mr. Rigby, isn't it true that when you came in with the private label on AG Stores, you quoted a price significantly less than the price charged on the Utah label pie?

A. Not significantly less, no.

Q. Let's get the numbers. Wasn't it $3.00 on the Frost 'N' Flame pie?

A. Yes, sir.

Q. And wasn't it about $3.70 on the Utah label pie?

A. I believe it was 3.60.

Q. 3.60.

A. With the advertising allowance.

Q. And since that time you have offered other private labels in the market, isn't that correct?

A. That is true.

Q. And the private label pies compete with the other brand pies, isn't that right?

A. Yes, sir.

Q. And wouldn't I be correct in understanding that the lower price on the private label pies could have a depressive effect upon the general pricing structure in the market?

A. It might to a certain degree.

Q. Because a manufacturer's price generally, Mr. Rigby, is converted into a retail price, isn't it?

A. To a certain degree.

Q. If a wholesaler or store can get a low retail price, he is pretty apt to do that, isn't he, in order to get by?

A. Yes, to a certain degree.

Q. And for manufacturers to compete for the business, they have to offer the price—a pie at a price which will permit their customers to quote a good retail price, isn't that right?

A. Yes, sir.

Q. And then when AG Stores, for instance, gets the Frost 'N' Flame pie at a $3.00 price, which is some 70 cents below the Utah label pie, that that price could be equated into a lower retail price than normally was prevailing before that time, isn't that correct?

A. No, sir.

[fol. 734] Q. Could you tell me why that is not correct?

A. As my recollection—as I remember, they were advertising Utah pies at three for a dollar. I believe Carnation was advertised three for a dollar. They advertised Frost 'N' Flame three for a dollar. At this time, as I recall, they did not sell Frost 'N' Flame pies less than three for a dollar, as I recall.

Q. At what time are you speaking of, sir?

A. In February of 1960.

Q. The Utah pie could be sold—that was at about 3.60 you say?

A. Yes, sir.

Q. And that could be sold at three for a dollar retail?

A. Yes, sir.

Q. And comply with the six per cent law?

A. Yes, sir.

Q. I take it that therefore a three dollar pie could be sold at considerably less than three for a dollar and comply with the law?

A. It could.

Q. You say it wasn't usually, but it could?

A. It could. As I recall, it wasn't sold less than three for a dollar at that particular time.

Q. So then AG was making what, more profit per pie than the other people in the market, so far as you know?

A. They were making a little more profit, but they were putting a lot more into it than the other people.

Q. I don't understand what you mean by putting a lot more into it.

A. They took this difference between the $3.00, part of the difference between the $3.00 and the $3.60 in advertising it, promoting it, getting the name started.

Q. Isn't it a fact that they allocated 10 cents a dozen to that promotion?

A. AG?

Q. Yes.

A. I wouldn't know, sir.

Q. Yes.

A. That is something new to me.

Q. So that whatever margin wasn't converted into promotions would be profit, extra profit, to AG that AG's competitors didn't have?

A. If that's what they wanted to do with it, yes, sir.

Q. Since that time you have expanded your private label operation, isn't that correct?

A. Yes, sir, we have.

Q. And in February of 1960 do you know of any price being offered in the market as low as $3.00 a dozen?

A. I don't recall, sir.

Q. And since you say you have added more private labels, can you identify those private labels for us?

A. We make Sonny Boy.

[fol. 735] Q. That started in what, March of 1960?

A. I'm not sure. About that time.

Q. Yes.

A. And Mayfresh.

Q. And Mayfresh is purchased by whom?

A. Mayfair Stores in Los Angeles. They have a branch here in Utah, American Foods and Grand Central.

Q. And you sell pretty regularly and continually to the Utah Wholesale Company, don't you sir?

A. Yes.

Q. And you sell, I take it, pretty regularly to the AG Stores?

A. Yes, sir.

Q. And to the Mayfair Stores?

A. Yes, sir.

Q. And those are three out of the four largest customers, isn't that correct?

A. Yes, sir.

Q. And with the Safeway Stores, which is the other large customer, you do a substantial volume of business, don't you?

A. We sell them some pies, yes, sir.

Q. My question was: a substantial volume of business?

A. We sell them a lot of pies, but I might add, sir, in 1961 we sold them less than half of what we did in 1960; in a growing market we sold them less than half the amount of pies.

Q. I am talking now about apple pies.

A. I am talking about—well, I can't break it down. I am talking about Utah pies.

Q. Utah label pies?

A. Utah label pies.

Q. Isn't it a fact that in 1960—I am sorry, in 1961, as against 1960, you sold them more apple pies in the latter year?

A. I don't know. We sold them less than half as much.

Q. And your private label pies have been generally available since 1960, at least, to the other large buyers in the market; isn't that right?

A. Not Mayfresh, no, sir. That didn't come until 1961.

Q. My question was whether or not you as a manufacturer weren't generally speaking willing to produce a private label pie for a large customer?

A. Yes, sir.

Q. Including Safeway?

A. Yes, sir.

Q. And you quoted those private label pies to Safeway?

A. Yes, sir.

Q. And it was generally known, I take it, in the market place that you were willing to pack a private label pie?

A. I don't know if it was known or not.

Q. And these private label pies, I take it, would be all priced at the same level? $3.00, whatever it was?

A. Depending on the quality you wanted, the size.

Q. The pies that you did and do pack are all the same quality, aren't they, sir?

A. Yes, sir.

[fol. 736] Q. And they are the same size?

A. Yes, sir.

Q. And they do come off the same machine?

A. Yes, sir.

Q. And those pies that are all the same quality and the same size, you price them all the same, don't you?

A. Yes, sir.

Q. And anybody who bought a private label, as an additional private label, would be paying the same price that you were charging to your other private label customers?

A. If the quality and the size was the same.

Q. That's right. Now, these private label prices are significant—well, you don't like the word "significant"—they are lower than the prices charged on your other pies; isn't that right?

A. At times they are, and at times they're the same.

Q. And they are lower than the prices charged by the other manufacturers competing in the market, usually, aren't they?

A. At times.

Q. They were through 1960?

A. I don't know. I don't recall, might have been, might not. I don't know.

Q. You offered a private label to Albertson's Stores haven't you?

A. They asked us to look into manufacturing them a private label, yes, sir.

Mr. Schafer: Would you mark these Morton's Exhibits next in order? I think you'd better give them different numbers.

(Defendant Morton's Exhibits No. M-63 to M-68 incl. were thereupon marked for identification.)

Mr. Alioto: We have no objection, counsel. Was the handwriting put on after?

Mr. Schafer: I'm very sorry. I marked the wrong copies. That's my handwriting.

Mr. Alioto: That's all right. Substitute them later on, or else you can take the writing off, either way; but that handwriting on these exhibits is yours?

Mr. Schafer: That's right.

Mr. Alioto: Okay. We have no objection, except for the handwriting, of course.

Mr. Schafer: I offer them in evidence, your Honor.

[fol. 737] Mr. Alioto: No objection.

The Court: Received.

(The exhibits marked Defendant Morton's Exhibits No. M-63 to M-68 for identification were received in evidence.)

By Mr. Schafer:

Q. Let me show you, Mr. Rigby, Morton's Exhibit 64, which has been received in evidence, as a letter that's, is it

not, from you to the Associated Frozen Food Stores, Attention Mr. Chapman, dated March 2, 1960. Right?

A. Yes, sir.

Q. And that letter quotes, Mr. Rigby, your pie prices of apple, $3.00, cherry pie $3.30, and boysenberry $3.15 per dozen. And at that time, Mr. Rigby, isn't it true that in March of 1960 you were selling the Utah label pie at from $3.60 to $3.70, and the cherry pie from $3.60 to $3.70?

A. Yes, sir.

Q. And the boysenberry pie about $3.70?

A. Yes, sir.

Q. Morton's Exhibit 63, Mr. Rigby, is a letter from you to Mr. Clarence W. Johnson. Could you identify him? Randolph Grocery Stores; is that correct?

A. That's true, sir.

Q. He's the buyer?

A. Yes, sir.

Q. This is a letter dated June 1, 1960, in which you are confirming prices quoted on pumpkin of $3.00 a dozen and mince of $3.30 a dozen, and peach pies at $3.23 a dozen. This is in June 1 of 1960. Can you recall your prices, sir, on pumpkin and mince in that year of 1960?

A. No, sir, I—well, not for sure.

Q. Would I be correct in stating that your price on pumpkin pies to AG Stores was $3.35?

Mr. Alioto: If your Honor please, the witness doesn't recall the—the exact price is in evidence. That can be told to the jury at any proper time.

Mr. Schafer: I wonder if I can refresh his recollection. If he can't remember—

Mr. Alioto: He says he doesn't know.

The Court: Well, he says he can't remember. It's already in the evidence—

Mr. Schafer: I thought maybe I could—

[fol. 738] The Court: And all you have to do is say to him that "the evidence shows this price."

By Mr. Schafer:

Q. A letter dated December 17, 1960, Mr. Rigby, to Mr. Henzke. I'll just show that to you and see if you can refresh your recollection. Is that offer as communicated there—was that made available to the other—your other customers in the market (handing)?

A. No, I don't remember it, sir.

The Court: What is the answer?

The Witness: I don't remember writing—

The Court: All right.

The Witness: I don't remember. It might—I presume we offered it, but I don't know. I can't remember. We usually offer it to everybody at the same time.

The Court: Well, well, just answer the question.

By Mr. Schafer:

Q. Do you recall, Mr. Rigby, that we asked you for copies of all your correspondence of this nature, and that was produced to us?

A. Yes, sir.

Q. If there was no other correspondence similar to the type shown in the Morton's Exhibit 65, could we conclude from that that there was no offer made of that nature to the other customers?

A. No, sir, you cannot.

Q. Do you recall, Mr. Rigby, that in September 13 of 1961 you offered to Roundup Grocery Stores mince pies at $3.40 a dozen and pumpkin pies at $3.20 a dozen?

A. I don't recall. We might have.

Q. If you had, that would be a price substantially lower than the price you were charging on pumpkin and mince to other customers in that season? Is that correct?

A. I don't know. I don't remember all prices at that time. You have the records.

Q. You don't remember whether you were getting $3.60 from some customers?

A. On pumpkin and mince?

Q. Yes.

A. In what year?

Q. 1961.

A. I don't recall.

Q. In Morton's Exhibit 68, Mr. Rigby, I simply don't understand. Could you look at that for a minute, please? And my question to you is, isn't the formula on which you're quoting there, isn't that the same formula as your other pies?

A. Yes, sir.

[fol. 739] Q. And it's for a 22-ounce pie?

A. Yes, sir.

Q. My question is, why do you quote a higher price for a 22-ounce pie than you were at the time charging for a 24-ounce pie?

A. They—this letter here refers—they wanted a price based on, an everyday price year round on a 22-ounce pie. And that is the price we gave them.

Q. Well, you've been charging through 1962 an everyday year round price of $2.90 per pie?

A. Not because we wanted to, sir.

Q. Now, do you disagree with the witnesses who have testified in this action, Mr. Rigby, that there was no competitive activity which compelled you to price at $2.90?

Mr. Alioto: Now, if your Honor please, he's asking him whether he disagrees with other witnesses who have testified in this action about that matter.

The Court: Yes.

Mr. Schafer: That's right, I am.

Mr. Alioto: That's an improper question, and we'll object to it.

The Court: Yes. It certainly is. That, we never permit, a comparison of the testimony of witnesses; not ask this man to approve or disapprove of what somebody else had testified to, Mr. Schafer. Objection sustained.

By Mr. Schafer:

Q. Now, normally, I think you said, small pies sell for less than large pies, right?

A. You mean—

Q. To the wholesale buyer.

A. Difference between the 20 or 24-ounce?

Q. Yes.

A. No.

Q. Normally, buyers aren't going to buy a smaller pie for as much or more than a larger pie? Right?

A. Normally.

Q. And because of that factor, isn't it true that Morton has to offer its pies according to your knowledge of the trade, that Morton has to offer its pies at a price less than the 24-ounce pie; isn't that right?

A. No, sir.

Q. Could you tell me why not?

The Court: Well, Morton doesn't have to do anything.

Mr. Schafer: It has to compete with the plaintiff, your Honor.

The Court: Well, your question is, Morton has to do something.

[fol. 740] Mr. Schafer: Whether in his judgment as a businessman it is necessary for a smaller pie to price less than a larger pie.

The Court: Well, you didn't ask him that.

Mr. Schafer: Well, I did ask him that, and he said yes, and then he went off the other way on the Morton pie, and I didn't understand that.

The Court: Well, reframe your question.

By Mr. Schafer:

Q. Isn't it true, Mr. Rigby, that a smaller pie has to charge less than a larger pie; that Morton, being a smaller

pie than a 24-ounce pie, would have to charge less than a larger pie?

A. Wouldn't have to, no, sir.

Q. Well, would it get any business if it didn't?

A. It could.

Q. Well, how?

A. It could get some business, yes.

Q. I'm talking about significant business. I'm not talking about a dozen here and there, Mr. Rigby. You understand that, don't you?

A. Yes, sir.

Q. If buyers won't pay as much for a smaller pie, how could Morton get any business?

Mr. Alioto: That's argumentative, if your Honor please. If the buyers won't pay more for a 22 or a 24—

Mr. Schafer: He's agreed with me they won't.

Mr. Alioto: I don't think he has.

The Court: It's argumentative. Objection sustained.

By Mr. Schafer:

Q. Taking a particular customer, Mr. Rigby—let's take, I don't care, take Safeway—take American Food Stores, if you will; could Morton get as good a price in American Food Stores with its 22-ounce pies as you can get for a 24-ounce pie, or anybody else can get with a 24-ounce pie?

A. Would you—will you say that again?

Q. Well, the buyer—from your experience in the industry, Mr. Rigby, and observing marketing conditions, would it be your testimony that the buyer for American Food Stores would pay as much for a 22-ounce Morton pie as it would for a 24-ounce pie of some other manufacturer?

A. He did, sir.

[fol. 741] Q. He did?

A. Yes, sir.

Q. He paid as much, or more? Than what?

A. He bought a 22-ounce pie when he could have bought a 24-ounce pie for the same price.

Q. For the same price?

A. Yes, sir.

Q. And you're referring now to that June, 1960, occasion?

A. Yes, sir.

Q. I take it the same price is the price that you quoted, isn't it?

A. Yes, sir.

Q. And is it not correct, Mr. Rigby, that when you quoted the equivalent price of Morton, according to your testimony of equivalents, that that order had already been placed by American Foods with Morton?

A. That one order, yes, sir.

Q. Yes. How about Safeway? Will Safeway to your knowledge and experience in the industry pay as much for a 22-ounce pie as it will for a 24-ounce pie?

A. They have done, sir.

Q. When was that?

A. In June of 1961.

Q. Is there any other occasion on which they've done so?

A. I don't know, sir.

Q. To your knowledge?

A. I don't know.

Q. Would you agree with me that generally speaking, Mr. Rigby, a 22-ounce pie has to charge somewhat less than a 24-ounce pie in order to get business?

A. No, sir. Not somewhat less.

Q. Well, is there some trouble with the word "somewhat"?

A. That could mean—to me it does, yes.

Q. It has to charge less; isn't that right?

A. It doesn't have to, no, sir.

Q. To get business, I mean.

A. It might have to be, yes, sir. To get substantial business.

Q. Yes. In order to get substantial business, a 22-ounce pie has to charge less than a 24-ounce pie?

A. It should, sir.

Q. Now, I take it we can agree, Mr. Rigby, that retail advertising is important to this business in terms of getting the volume we're talking about?

A. Yes, sir.

Q. You've got to have that in order to get volume?

A. Yes, sir.

Q. Now, isn't it true that retailers won't advertise a pie unless they've got a price competitive with the other retailers' pies, according to your—

Mr. Alioto: What retailers do, retailers should testify to. We have no—

Mr. Schafer: They have, Mr. Alioto. And I just wondered if that was in accord with the witness's experience in the industry.

[fol. 742] Mr. Alioto: I object on the ground that he's calling on this witness to state the mental attitude of third parties.

The Court: Sustained.

By Mr. Schafer:

Q. Have you observed, Mr. Rigby, that any one retail organization will consistently advertise a pie at a higher price than is generally prevailing in the other retail outlets?

A. Yes, sir.

Q. You have?

A. (Witness nods head.)

Q. What retail organization is that?

A. I.G.A.

Q. And what pie do they advertise?

A. The I.G.A. pie—or, Pictsweet pie. Either one.

Q. Who manufactures that?

A. Stokely VanCamp, I believe.

Q. Is that a private label pie?

A. Pictsweet? No, sir.

Q. And is that a larger pie?

A. No, sir.

Q. That's the same pie as your pie; is that right?

A. No, sir.

Q. You say, "No, sir"?

A. It's smaller.

Q. It's smaller?

A. Yes, sir.

Q. And that pie is what? Priced higher retail than your pie?

A. Not higher—they advertise at three for a dollar. Or three for 89.

Q. We're talking about 1961?

A. We're talking about 1961.

Q. Yes. Now, is there any other instance where a retailer consistently advertises a pie which is non-competitive with the other pie?

A. Not consistently.

Q. Would you have information, Mr. Rigby, on which you could base a judgment as to whether or not the AG Stores would buy a 22-ounce pie at a price as high as the pie they were buying at 24-ounces?

A. No, sir. I don't—I don't know, sir.

Q. You don't know whether they would or not?

A. No, sir.

Q. Okay. Now, you testified, Mr. Rigby, that in June of 1961, Morton put its pies on the market at $2.85. Right?

A. Yes, sir.

Q. And then what action did you take in response to that price reduction, sir?

A. I met their price, sir.

Q. Had there been any other occasion, Mr. Rigby, that you can recall specifically where you had reduced your price in response to a price reduction made by Morton?

A. Not by Morton. By other defendants.

Q. This is the first time that you had adjusted your pricing to comport with Morton prices; is that right?

A. As I recall.

[fol. 743] Q. And Morton's price was $2.85; is that correct?

A. $2.55 f.o.b. California.

Q. $2.85 here? Right?

A. Yes, sir.

Q. And your pie was priced at that time at $3.10 here in Salt Lake; is that right?

A. Yes, sir.

Q. And then you reduced your price from $3.10 down to what?

A. $2.75.

Q. And you offered that $2.75 price to whom?

A. To everybody.

Q. Isn't it a fact that you offered it to an organization such as Northern Sales and Chase's Ice Cream and Booth Fisheries?

A. I sold it to them at that price.

Q. Now, Morton had not offered it to them at that price, had they? $2.85?

A. I wouldn't know. They were distributors. They were our customers, just Utah Wholesale, Associated, and anybody else that were our customers. We offered our price to everybody.

Q. Didn't you know as a fact that Morton didn't sell to those small customers because they couldn't take in large enough quantities?

A. I didn't know that, no, sir.

Q. Do you know whether or not Morton did offer pies to those customers?

A. No, sir, I did not.

Q. And you sold that $2.75 pie for how long, Mr. Rigby?

A. Approximately a month, five or six weeks. I don't remember the exact time. Not very long.

Q. You sold it to AG Stores—what? Through August; isn't that correct?

A. I don't—I don't know. I'd have to look at the records.

Q: The records will show, Mr. Rigby, that you sold it to the AG Stores through August of '61, and they will also show that you sold the pie at $2.75 to Utah Wholesale up until August 5 of 1961. Does that comport with your recollection of the facts?

A. It might. I don't remember.

Q. So that there was a period of time during which you were selling to AG Stores at $2.75, where you had stopped selling to Utah Wholesale at $2.75?

A. I might add to that, Associated Foods contracted so many thousand cases of apple pies at that price, and we fulfilled the contract.

Q. You entered into a commitment with AG Stores to sell at $2.75, then—

A. No, we did with all of them, all of our customers, AG and Utah Wholesale, we offered to—if they gave us an order, we would fill the order. We offered to every customer that we had.

[fol. 744] Q. No matter how long it took to fill the order?

A. That's true.

Q. Were the amounts the same for the various customers?

A. They ordered what they wanted to order.

Q. They could order any quantity they wanted to?

A. Within certain limits. We wasn't going to go a half a million cases at that price. Within reason.

Q. And they had a guaranteed price, then, of $2.75 over a significant period of time?

A. I think we gave them, told them they could buy ten thousand cases, something like that. I don't remember.

Q. Yes. And that could last what? Two and a half months or so?

A. No.

Q. Well, do you disagree that the AG Stores continued to purchase pies at $2.75 up through August?

A. I don't—

Mr. Alioto: There's an ambiguity in the question. You mean continued to take deliveries—

Mr. Schafer: Yes.

Mr. Alioto: —or continued to get new orders?

Mr. Schafer: Continued to take deliveries.

Mr. Alioto: Take deliveries under a pre-existing order?

Mr. Schafer: Right.

Mr. Alioto: Well, whatever the record shows on that, we have it in evidence.

The Witness: If that's what the record shows—I don't remember.

By Mr. Schafer:

Q. That would be two and a half months, wouldn't it? I mean, you started in June, mid-June, isn't that correct?

A. About that.

Q. Yes. And if it went through August, that would be two and a half months?

A. I suppose.

Q. Do you know how long the Morton offer was available for? Was it two weeks or three weeks—or don't you know?

A. I only know what I was told.

Q. Yes. Now, that price by Morton was on the apple pie; isn't that right?

A. Apple and coconut custard.

[fol. 745] Q. And you don't make coconut custard, do you?

A. No, sir, we don't.

Q. And you reduced your price on what? In response to this price reduction by Morton?

A. Apple.

Q. Just on apple?

A. Yes, sir.

Q. And you kept your price the same on the other flavors?

A. Yes, sir.

Q. And you sold a lot of apple pies, didn't you?

A. Yes, sir.

Q. And you were making a profit, weren't you, on those $2.75 pies?

A. Yes, sir.

Q. Do you know, Mr. Rigby, of any competitive reason why you were selling, if I'm correct in my facts, and I think I am, why you were selling to Roundup Stores in 1962 at $2.90?

Mr. Alioto: If your Honor please, 1962 is after the period of the complaint, if your Honor please.

Mr. Schafer: That's right.

Mr. Alioto: Unless this has some relationship to a theory of damages, I think it would be inadmissible.

Mr. Schafer: It has relationship, your Honor, to the theory of whether or not there has been substantial lessening of competition in the market place.

Mr. Alioto: That's on the question of liability, rather than damages. We will object that it's not relevant, what happened in 1962.

Mr. Schafer: May I say something, your Honor? The jury is being asked to predict future market effects. And it seems to me that all evidence that has a bearing on the market activity up to the date of the trial is relevant to a consideration of what's going to happen in the future in the market place.

Mr. Alioto: Well, I withdraw the objection, if it means anything. I withdraw the objection.

The Witness: We have a $2.90 price in all the pies that we manufacture on apple at this time, to every customer that we sell to, they can buy it for $2.90.

[fol. 746] Q. And that is the price quoted to Roundup, isn't that right?

A. F.o.b. Salt Lake City.

Q. Do you know of any competitive reason existing in the Spokane market which would have compelled the 2.90 price to Roundup?

A. We told Roundup we would always give him the best possible price we could. We sell our pies in Salt Lake City

for 2.90 to every customer that buys from us, and he is a customer of ours, so therefore we sell to Roundup for 2.90.

Q. That, then, is a price quoted to Roundup that is not related to competitive conditions in the Spokane market, right?

A. I wouldn't say that.

Q. Why would you not say that? I thought you just said you quoted them a price because you quoted the same price in Salt Lake City.

A. That is true, but they may have the same competitive actions going on in Spokane. That is something I cannot answer.

Q. You don't know?

A. No, sir.

Mr. Schafer: Your Honor, do you want to break—

The Court: No.

Mr. Schafer: I have a breaking point here. Do you want to go on?

The Court: I don't want to break. We are going to one o'clock.

By Mr. Schafer:

Q. Mr. Rigby, in connection with your short relationship with Mr. Chapman as broker—

A. Yes, sir.

Q. You, as I understand it, paid Mr. Chapman some brokerage for a short period of time, is that correct?

A. As I recall, sir, we did.

Q. And during that period of time you increased your price to the AG Stores in order to pay that brokerage?

A. Yes, sir.

Q. Could we assume, Mr. Rigby, that you stopped paying Mr. Chapman a brokerage at the time you cut off the relationship with him?

A. I don't know if we could or not. That was back two

or three years. I won't recall how long we paid him or the exact dates.

Q. Would your invoice to Mr. Chapman, Mr. Rigby, serve to help in defining the date on which you stopped your relationship with Mr. Chapman?

A. I don't know if it would or not.

[fol. 747] Q. Do you want to have a look at it?

Mr. Alioto: I have no objection to the invoice going in to show the date itself.

Mr. Schafer: All right, I offer the invoice, your Honor.

Mr. Alioto: No objection.

The Court: It is received.

(The document marked Defendant's Exhibit M-7 for identification was received in evidence.)

By Mr. Schafer:

Q. That shows, Mr. Rigby, that on October 4, 1960 you made the last payment to Mr. Chapman, is that correct?

A. That is what it says.

Q. Would that refresh your recollection that that was the—

The Court: You don't need to refresh his collection. You can prove it by the exhibit.

By Mr. Schafer:

Q. Can you tell us now, Mr. Rigby, when it was that you terminated your relationship with Mr. Chapman?

A. On or about the first week of October. I don't really remember.

Q. And you testified earlier in this trial, Mr. Rigby, that you had planned on raising the price of your apple pies anyway.

A. Yes, sir.

Q. ... that correct?

A. T... is true, sir.

Q. Because of an ingredient price increase?

A. Yes, sir.

Q. That was on apple pies?

A. Yes, sir.

Q. That was on the Frost 'N' Flame label?

A. Yes, sir.

Q. And those are the same apples that go into your other pies, is that right?

A. Yes, sir.

Q. Did you raise your price on the other pies to compensate for the same ingredient costs?

A. Not that I recall.

Q. So that the ingredient cost was only on the Frost 'N' Flame pie?

A. We only raised on the Frost 'N' Flame pie at that— I don't recall if we did or did not on the Utah. I'm sure we would have tried to, would like to have.

Q. You had from time to time, I take it, taken ingredient price increases to other customers, is that correct?

A. Pardon.

[fol. 748] Q. You had from time to time taken increased prices to compensate for ingredient costs, to other customers, isn't that right?

A. From time to time we have raised our prices, yes, or tried to. We are not always able to, though.

* * * * * * *

(The documents marked Defendant's Exhibits M-69 and M-70 for identification were received in evidence.)

By Mr. Schafer:

Q. Mr. Rigby, M-69, received in evidence, is a letter dated July 6, 1960, in which Mr. M. O. Rigby— Could you identify him, please?

A. He is my father.

Q. And Mr. M. O. Rigby writes to Mr. Johnson of Roundup Stores, and he says it is necessary to raise the prices because of ingredient cost increases on frozen apple pies from 2.88 to $3.00, and on cherry pies from $3.23 to $3.35, and on boysenberry pies to 3.30.

Isn't it true, Mr. Rigby, that no other ingredient cost price increases were taken at the same time to any of the other customers with whom you dealt?

A. I don't recall.

Q. Do you not recall that the Frost 'N' Flame pie price stayed the same through 1960 until October?

A. It might have.

Q. That it started at $3.00 in February and ran at $3.00 until October—or September of 1960?

A. Yes.

Q. You recall that?

A. Yes, sir.

Q. So that no ingredient cost increase was taken on the Frost 'N' Flame apple pies at that time?

A. No, sir.

Q. But one was taken with the Roundup Stores?

A. Yes, sir.

Q. And they were the same apples?

A. Yes, sir. As I recall, they were raised up to the same price as Frost 'N' Flame.

Q. Yes, I think that is right.

A. Then they were the same at that time.

Q. That's right. They were lower, then you raised them up?

A. Yes, sir.

[fol. 749] Q. And the reason given was that there had been costs—increases in cost of ingredients?

A. Yes, sir.

Q. That went into the Sonny Boy pies?

A. Yes, sir.

Q. And M-70, Mr. Rigby, is a letter written by Mr. M. O. Rigby again to Associated Frozen Foods, attention Mr. Chapman, dated July 11, 1960, in which Mr. M. O. Rigby announces that a price increase in boysenberry pies is necessary because if ingredient cost increases.

Do you recall, Mr. Rigby, that no other price increases were taken at the same time on boysenberry pies to any other customer?

A. No, I don't recall that, sir.

Q. Is it your testimony you don't know one way or the other?

A. No, I don't recall the incident.

Mr. Schafer: Will you mark these.

By Mr. Schafer:

Q. While the clerk is marking those exhibits, Mr. Rigby, I think I can take up one other matter with you. It is your recollection, is it not, Mr. Rigby, that Mr. Chapman became Morton's broker in October of 1960?

A. The only thing I know about when he became broker for Morton is by the letter that is in evidence. That is the only thing I know about the date.

Q. Would it be your testimony, Mr. Rigby, that you were paying brokerage payments to Mr. Chapman at a time when he was the broker for Morton?

A. At that time I didn't know if he was broker for Morton or not. I found that out during the course of this trial.

Q. You don't really know when he became broker then?

A. No, sir, I don't.

Q. Whenever he became broker—were you aware of the various price concessions in terms of advertising allowances that Morton made after Mr. Chapman became broker in this market up to June of 1961?

A. Some of them. I had heard that he had offered some.

Q. And they didn't give you any competitive difficulty, did they?

A. They gave us—not to a great extent, no.

Q. No more than anybody else's competitive activity?

A. No, sir.

Q. You didn't reduce your price in response to any of these price concessions?

A. Not that I recall.

Q. These price concessions occurred between the time Mr. Chapman became a broker and some eight months later, in June of 1961?

A. That is true.

[fol. 750] Q. And in June of 1961 Morton reduced its price on one of its flavors that competed with you, isn't that right?

A. No, sir.

Q. On the apple?

A. No, sir.

Q. Why isn't that right?

A. He reduced the price on apple and coconut custard, and that had—in effect, cut our sales.

Q. He did not reduce the price—Morton didn't reduce the price on peach or boysenberry or cherry pies, did they?

A. No, sir.

Q. And on those pies they were directly in competition with your pies, is that correct?

A. That is true.

Q. You didn't make coconut pies, and yet they reduced the price on coconut pies?

A. Yes, sir,

Q. Are you aware of the fact that Mr. Chapman was making sales efforts on the rest of the Morton line in this area at the same time, a line in which you don't compete in at all, as I understand it?

A. No, I was not aware of that.

Q. Am I correct in understanding, Mr. Rigby, that you buy, or have bought, your apple requirements from the Del Mar Company?

A. We have bought some apples from them, yes, sir.

Q. And you bought these through '58, '59, '60, and '61, did you not?

A. No, sir. We did not buy—I don't believe so. I don't think so. I don't think we bought that many apples from Del Mar.

Q. If your responses to interrogatories indicated otherwise, would that indicate that your answer here is incorrect?

A. I am not sure the years that we bought apples from Del Mar Foods, but I do not believe it was for four years.

Q. If your interrogatories—

Mr. Alioto: If you have the interrogatories, I will stipulate that they may go in evidence on those figures, and we won't have to waste time on that, as to what their books show.

Mr. Schafer: That's fine. It is not what our books show, but what the plaintiff's responses to interrogatories show.

Mr. Alioto: That's what I say, what their books show. That is where they got them, from their books, and it is stipulated they may go in evidence.

Mr. Schafer: Right.

By Mr. Schafer:

Q. Morton never lowered its price to $2.75, did it, Mr. Rigby?

A. Yes, sir.

[fol. 751] Q. It lowered its price to $2.75?

A. Yes, sir. That's what forced us to lower our price to $2.75.

Q. I am talking about delivered price to Salt Lake City. Did it ever get as low as $2.75?

A. Yes, sir.

Q. Am I not correct in understanding it was $2.85?

A. The reason we went to $2.75—

Q. I am asking you—

Mr. Alioto: Wait a minute. Let him finish.

Mr. Schafer: He is not answering the question.

Mr. Alioto: Yes, he is.

By Mr. Schafer:

Q. Did Morton ever quote an f.o.b. Salt Lake City price of $2.75?

A. They quoted a price of $2.75—let me say it this way, if I may.

Q. Go ahead.

A. If the Judge is—

Q. Go ahead.

A. Associated Foods—the reason we lowered our price to $2.75 is this: In the middle part of June of 1961, Mr. Claud Purles from Associated Foods called me on the phone and he told me that Morton had offered them a price of $2.55 f.o.b. California, or $2.85 delivered. If they chose to pick them up in their own trucks in California they would give them a 30-cent-a-dozen pickup allowance.

Q. That is the 2.55.

A. 2.55, right. But, he said, "It would cost me, on my own truck, 20 cents a hundred," which is 20 cents a dozen —or, I mean a dollar a hundred or 20 cents a dozen, to deliver them in Salt Lake City, which was 2.75 in Salt Lake, his cost. He could sell pies at a retail level at four for a dollar. He was offering him a pie that he could sell four for a dollar, up until this time was unheard of for many years.

He said, "I cannot afford to turn it down." He said, "If you don't meet that $2.75 price, we will buy Morton pies."

So therefore we had no other alternative but to lower our price to $2.75, because that's what they would have cost him, $2.75. So, therefore, we met Morton's delivered price.

Q. And whether or not they cost him $2.75 was a decision he made himself as to whether to pick them up or not, isn't that right?

[fol. 752] A. That is true. They have their trucks running back and forth from California.

Q. Isn't it correct that, say, Safeway picked up half of its order at the 2.85 price, isn't that right?

A. I don't know.

Q. And isn't it correct that the first pies to be advertised in this market at four for a dollar were the Utah pies, or the Frost 'N' Flame pies, if you will?

A. Yes, sir, that is true, but, if I may qualify that answer, if we had not lowered our price to $2.75, we would not have been the first ones. Morton would. We would have lost the account of Associated.

Q. For how long?

A. For how long? Well, I would think from that time until now, until this very time, because it had a tendency to lower the price of pies.

Q. Aren't you aware, Mr. Rigby, that the Morton price quotation was on a two-week basis?

A. No, I'm not aware of that. I am not, sir.

Q. Isn't it true that buyers in the market, Mr. Rigby, try to get the best price they can?

A. Yes, sir.

Mr. Alioto: He has asked that a thousand and one times, if your Honor please.

The Court: Yes.

By Mr. Schafer:

Q. Don't they try to talk you into giving them the best price they can?

A. Talk me.

Q. Yes.

A. They know our prices.

Q. Well, they know your prices, but weren't they trying to talk you into a better price?

A. No, sir.

Q. No?

A. All they wanted me to do was meet—

The Court: Don't argue with him. My goodness gracious, he has told you. You are not going to talk him out of it.

By Mr. Schafer:

Q. Now, Mr. Rigby, it is true, isn't it, that you offered these 2.75 pies to people who couldn't possibly pick them up in Watsonville, California?

A. That is true.

Q. What was the reason for that?

A. We wanted to have all the pies we made, every customer we sold to would be competitive with one another.

Q. You weren't going to lose those accounts, were you?

A. Not if I could help it.

[fol. 753] Mr. Alioto: If your Honor please, this is argumentative.

Mr Schafer: I can ask that question on cross-examination of this witness, your Honor. I submit it.

The Court: What do you argue about it for when the question has been answered? You have your answer.

Mr. Schafer: I didn't ask him—

The Court: I haven't said a word to you.

Mr. Schafer: I hadn't asked him—

The Court: Why don't you examine the witness.

By Mr. Schafer:

Q. Did you think you were going to lose your Northern Sales account, Mr. Rigby, by reason of the 2.55 f.o.b. Watsonville price quotation to California as to Northern Sales?

A. Yes, sir.

Q. You thought Northern Sales could go down and pick up at 2.55?

A. No, sir. They buy a lot of merchandise from Utah Wholesale Frozen Foods.

Q. They bought them direct. That's what I'm talking about.

Mr. Alioto: Let him finish his answer.

A. (Continuing) They buy a lot of merchandise from Utah Wholesale Frozen Foods. Utah Wholesale has their own trucks. And therefore, they could have bought pies at that price and we would have lost sales. Chase's Ice Cream in Provo bought from Utah Wholesale Frozen Foods, and she could have bought at the very same price.

Q. Don't they also buy direct?

A. On occasion, but they buy a lot of their merchandise through Utah Wholesale.

Q. You sold pies at 2.75 to Booth Fisheries and Chase's Ice Cream?

A. Yes. They buy from us direct, but they can, if they so desire, buy from Utah Wholesale.

Q. I understand that, but the fact of the matter is they couldn't go down to Watsonville and pick these things up?

Mr. Alioto: That is argumentative as to whether somebody could go down to Watsonville.

[fol. 754] The Court: Yes. Sustained.

By Mr. Schafer:

Q. So that you took a 24-ounce pie and put a 2.75 price on it in response to Morton's 22-ounce pie at 2.55 in California?

A. Yes, sir.

Q. Would you agree with me, Mr. Rigby, without doing the mathematics—or if you want to do the mathematics, you can, but—

The Court: No, he can't. If it is just a matter of adding or subtracting figures, you fellows can do it. We don't ask the witness to do that.

By Mr. Schafer:

Q. Did you ever compute that on an ounce-for-ounce basis, Mr. Rigby, and determine whether or not the 2.55 price on a 22-ounce pie in California is the same as the ounce-for-ounce price on your pie at 2.75 in Salt Lake City?

A. That makes no difference to me.

Q. The question was whether or not you had ever figured that out?

A. No, sir, I have not.

Q. Now, Mr. Rigby, in respect to your testimony that Northern Sales, as an example, could purchase pies from Utah Wholesale, and therefore you offered them the 2.75 price—

A. Yes, sir.

Q. (Continuing) —isn't it true that Utah Wholesale, in selling to Northern Sales, would have to put a markup on them?

A. A freight allowance. And they work on very small margins; sometimes on things like that, as low as one or two per cent.

Q. Northern Sales wasn't going to get their pies at 2.55—or 2.75, I mean?

Mr. Alioto: That is argumentative.

By Mr. Schafer:

Q. Isn't that correct?

The Court: Sustained.
Mr. Alioto: Utah Wholesale—
The Court: Sustained.

By Mr. Schafer:

Q. And so when Morton came in with what the record shows to be a two-week or so offer, what you did was to commit yourself to deliver pies at $2.75 over a varying period of time, which, in any event, lasted two and a half months, is that correct?

[fol. 755] A. If my recollection serves me, Morton's price on this 2.55, or 2.85 delivered price, was for three weeks, and it went off, I think, for a few days, and it went back on again and off again and on again.

Q. Well, if the record doesn't show that, that would be just wrong, wouldn't it?

Mr. Alioto: If your Honor please, that's argumentative. I can't understand this kind of questioning.
The Court: Yes. It is sustained.

* * * * * * *

(The exhibits marked Morton's Exhibits No. M-71 to M-86 inclusive for identification were received in evidence.)

By Mr. Schafer:

Q. Now, Mr. Rigby, Morton's Exhibit 71 in evidence is a letter from yourself to Mr. Alan W. Young dated April

4, 1960. I'll let you have a copy of that letter to go along with me. In that letter you quote a price to Safeway Stores of $3.00 per dozen; isn't that correct?

A. Yes, sir.

Q. And that was a price on your own label—I'm sorry—not label—but your own formula pie; is that correct?

A. That's what the letter says.

Q. And so Safeway was being offered a $3.00 price in April 4, of 1960 on your own formula pies?

A. Yes, sir.

Q. And the price to other customers at that time in the market was $3.60; is that correct?

Mr. Alioto: On what pie?

[fol. 756] Mr. Schafer: Apple pie.

Mr. Alioto: Utah Pie?

Mr. Schafer: The Utah label pie.

The Witness: We offered this price, our own formula, to be put in the Bel Air box, as their private label.

By Mr. Schafer:

Q. It's your own formula? That's the point.

A. Yes, but in their box as a private label.

Q. This price includes shipping cases?

A. Shipping cases?

Q. Yes.

A. Yes.

Q. It does that, doesn't it?

A. Yes, sir.

Q. Does it include boxes?

A. Yes, sir.

Q. Yes. Now, Mr. Rigby, Morton's Exhibit 14 next in order, I think in your group, is a letter dated September 22, 1960, from yourself to Mr. Alan Young, and in there you're quoting on pumpkin and mince pies; is that correct?

A. That's true.

Q. And that's on your regular formula?

A. With slight modifications, yes, sir.

Q. It says, "The following is based on our regular formula"?

A. Yes, sir.

Q. And do you recall that those prices quoted at $3.10 and $3.35 respectively were considerably lower than the prices charged on your Utah label pies to other customers in the Salt Lake market?

A. These were to be put in the Bel Air boxes, private label.

Q. I understand that. But the same pie in a different box was selling at a higher price to other customers in the market?

A. Private label, yes, sir.

Q. Now, October 11, 1960, Mr. Rigby, on Morton's Exhibit 15, you write a letter to Mr. Young. You have that before you?

A. Yes, sir.

Q. And you say—I'm going to read the relevant paragraph, unless counsel wants me to read the entire document—

Mr. Alioto: No, just what is pertinent, what you have in mind.

By Mr. Schafer:

Q. "Relating to differential Bel Air price to our regular trade, we wish to say that this difference does not exceed the savings we would realize in our cost of manufacturing, sale (excluding brokerage or brokerage expense), or delivery, which would result in different methods or quantities in which these products would be sold and delivered by us to you and by us to other customers."

Now, what savings are you referring to there, Mr. Rigby?

[fol. 757] A. Savings between the difference and the cost —or, the selling prices? Is that what you're referring to?

Q. Your selling prices, yes.

A. Well, there would be advertising, promotion, selling.

Q. Now—is that all?

A. No.

Q. What else?

A. Demonstration, in-store promotions.

Q. You're just naming now, if I may interrupt you, just different methods of promotions? Is that right?

A. Well, there are different methods, but yet they all pertain to why the difference in price.

Q. Yes. They don't amount to fifty or sixty cents a dozen, though, do they?

A. Yes, sir. I would think so.

Q. Now, do you have any data which would support that conclusion?

A. No, I have no data to support that conclusion, but yet I have my knowledge of—and my experience in the type of work.

Q. Now, does anybody else do this type of work besides you for the company?

A. No, sir.

Q. Just yourself?

A. True, sir.

Q. Now, what kind of promotional work do you do besides regular *cars* on the trade or by telephone or letter.

A. Right there gives a big factor. Selling or calling on the stores. Now, Safeway has, I think, 65 or 70 stores in this division, which covers all of Idaho and Utah and parts of other states, which would be impossible for me to call on regularly. To do this, I would have to—we would have to hire other salesmen to call on the stores. So, therefore, if we reflected the, part of this in the cost, put it under their label, and let them sell it, let them put the product in this order, so to speak, forced distribution under the Bel Air label—and that's what it does—so we wouldn't have that expense.

Q. But my question is—I'm not sure you understood—my question was, you don't have a sixty cent expense per dozen in selling Utah as against Bel Air?

A. Yes, sir. Now, that's what I'm—

Q. Is it anything other than your salary?

A. Yes, sir.

Q. What else?

A. Salary of other salesmen we would have to call—
Q. I'm talking about what other facts you have—

Mr. Alioto: Well, that's what he's talking about. I think he should be permitted—
Mr. Schafer: I don't mean to interrupt. I don't think you understood my question.

[fol. 758] A. I understood your question exactly.

The Court: Why don't you let him finish his answer?
Mr. Schafer: All right.
The Witness: Any salesman that calls on the retail trade in this area will agree with me—

By Mr. Schafer:

Q. I don't want you to tell us—
A. Well, the most calls they can make in a day and do an affective job is between ten and fifteen calls. So, therefore, to make all the calls that there are, or all the stores—and call on all the stores there are in this market, one person cannot do it, and do it on a regular basis. So, therefore, he would have to have additional help. Now, if we could make pies under a Bel Air label and sell it to them, it would not be necessary for any of our salesmen to call on the Safeway stores. We would have to make one call per week, and that's to the office. And I can do that. That's located here in Salt Lake City. So that saves us a considerable amount of money in salesman's wages.

Now, another method of saving money is on our Utah pie pumpkin, many, many times we would go into the stores on weekends and demonstrate pumpkin pie. We would bake our pumpkin pie, serve them to the customers, put whipped cream on them many times, and have the customers sample our pies. We would hire a girl to do this, which was very costly.

And then there was our co-op advertising that we would not have to have, which amounted to ten cents a dozen right there. And these other factors. I honestly believe

through my knowledge of this business there is a fifty or sixty cents a dozen savings.

By Mr. Schafer:

Q. In order to sell pies, you call on the Safeway headquarters; isn't that right?

A. Yes, sir.

Q. And you go to Safeway headquarters, and you offer them a price?

A. Yes, sir.

Q. And they either take it or leave it?

A. Yes, sir.

Q. And that's the way you handle Utah, and that's the way you handle private labels?

A. That's true.

Q. You never did hire any salesmen, did you?

A. No, sir.

Q. And these promotional allowances, you don't have any data—I'm sorry—promotionals like putting whipped cream on pie—you don't have any data which would support the conclusion that that would amount to anything like fifty cents a dozen—

[fol. 759] A. I didn't say that—that that alone was fifty cents a dozen.

Q. Do you have any data which would tend to support the conclusion that it's any significant amount of money at all?

A. No, I have no data.

Q. Yes. Now, the expenses you've actually incurred in selling Utah label pies, then, are really basically your own *salarys*, is that correct, in calling on these headquarter stores?

A. Partially, yes.

Q. And that's the same kind of selling effort you make on a private label, isn't it?

A. Yes, sir.

Q. On the Bel Air in respect to this Morton's exhibit 15, there is no significant difference in the cost of manufacturing, is there?

A. In these—

Mr. Alioto: Excuse me. There's an ambiguity in that question, again. You mean if he had received a million case order, that his manufacturing costs would have been the same?

Mr. Schafer: I mean in respect to the actual manufacturing he did do, is there a cost differential between the Bel Air and the Utah label pies sufficient to warrant the differential in price.

The Witness: There's no big factor, no big difference, no, sir.

By Mr. Schafer:

Q. No difference in costs of delivery, either, are there?

A. No, sir.

Q. No difference in the methods or quantities in which the products would be sold?

A. No, sir.

Q. Now then, Mr. Rigby, I turn to Morton's Exhibit 15—I'm sorry—it's not 15. It's dated December 30, 1960.

A. I have it here.

Q. What number is that?

A. It's 15 here, and 74 up there.

Q. Morton Exhibit 74.

Mr. Alioto: What is the date of that?

Mr. Schafer: December 30, 1960.

Mr. Alioto: Thank you.

By Mr. Schafer:

Q. That's a letter that you received from Mr. Alan W. Young?

A. Yes, sir.

Mr. Schafer: I shall read this letter to the jury, if I may, your Honor.

[fol. 760] "Dear Mr. Rigby: We realize that you are anxious to pack other flavors for us and that it certainly would save us some freight if we could pack in your plant.

However, there are several reasons which make us hesitate to do so at the present time. First, the prices you quoted us on pumpkin and mince were below your prices on your own brand as you were able to reflect a cost savings. However, the prices you quoted us on fruit pies are substantially higher than you are quoting on your own brand. And two out of the three which you have quoted us are substantially higher than we are paying our present supplier. We are concerned at the absence of any quality control in your plant. The fact that this may result in pies that are not equal to the quality which you are supposed to be packing showed up in the production sample you sent to us, where one of the pumpkin pies was extremely runny. In fact, all of them were more moist than the samples shipped from the production made while Mr. Roth was there, and we are wondering if the five to seven per cent moisture reduction, which we requested and for which we paid an additional price, was actually incorporated in all of the production. Although we specifically checked with you by wire beforehand to be sure that the ingredients on our mince and pumpkin cartons were correctly stated as far as your formulas were concerned, and although you confirmed that they were, we found on actually checking production that this was not the case. You also promised to install a coding device, but there was no evidence of this on the samples you shipped to us from production. So, of course, we cannot pin down the defective pumpkin samples, even to the day of production. Incidentally, even if automatic coding of every package wasn't possible, the production sample should have been clearly marked or banded, so that the date and time of production for that particular sample would be known.

"If you care to discuss the above points in greater detail we would be happy to do so."

By Mr. Schafer:

Q. Now, in the next letter in this pile, Mr. Rigby, dated August 17, 1966, which is Morton's 75 in evidence—it's a letter from Mr. Young to yourself, is that correct?

A. Pardon?

Q. That's a letter to yourself from Mr. Young?

A. Yes, sir.

Q. And in this letter, can we summarize it by saying that he is asking you to quote prices on pumpkin and mince pies for sale in the Salt Lake City Division and the Denver Division of the Safeway Stores; is that correct?

A. Uh huh. Yes, sir.

Q. And on Page 2 of the letter he asks you to quote prices on the Bel Air peach pie, giving you a formula, and the boysenberry pie, again giving another formula.

A. Yes, sir.

[fol. 761] Q. And in the last paragraph on Page 2, he again expresses his concern about daily production reports and upon quality control reports, and so forth. Now, on August 23, 1961, Mr. Rigby, you respond to Mr. Alan Young; is that correct?

A. Yes, sir.

Q. What exhibit number is that, please?

A. 76.

Q. And you write to him price quotations of $3.55 on mince pie and $3.40 on pumpkin pies f.o.b. Safeway warehouse. And you state that the prices are a little higher than last season but due to ingredient costs and shipping cases and extra reports and other requisites, you find it necessary to make the increase. And you state then that the mince pies will be the same formulas and brands that you used last year. So there will be no change there. What does that mean, Mr. Rigby?

A. We hadn't changed our formula any.

Q. You were using the Utah formula, is that right?

A. Yes, sir.

Q. And the mince pie label, was it under the Bel Air label?

A. Yes, sir.

Q. And then you state:

"In regards to your question about a coding *devise* for each pie carton—no we are not any closer to installing this

devise. As we stated last year if we acquired All the Bel-air pie business for this area we would definitely install the coding *devise* for your purposes, but to install it for use on possible Bel-air Mince and Pumpkin business each season we feel the cost would be prohibitive."

And then you quote prices for delivery to Denver, Colorado.

Now, in fact, Mr. Rigby, in respect to that August 23, 1961 letter, had the ingredient costs increased?

A. Yes, sir. That's what it said. I don't recall the exact ingredients.

Q. Do you recall that on mince pies for instance, Mr. Rigby, your price didn't change from 1960 to 1961 to Utah Wholesale?

A. I don't recall that.

Q. Or that it didn't change in price to Tosco Distributing Company?

A. No, I don't recall that.

Q. Pumpkin business, do you recall that your price didn't change to Utah Wholesale?

A. No, I don't recall.

Q. Or AG Stores?

A. I don't recall.

Q. Or Tosco Distributing?

A. No.

Q. Then on August 25, Mr. Rigby, we have a letter to you from Mr. Young again.

[fol. 762] Mr. Schafer: And I will read that letter, if I may, your Honor.

"Thank you for your letter of August 23. We were somewhat surprised to find that your prices had increased 20¢ per dozen on Pumpkin and 17¢ per dozen on Mince as compared to last year.

"You mention that this is due to the increase in ingredient costs, shipping cases and the extra reports and other requisites, and we are wondering to what extent we are being penalized for the reports we have requested.

"It is our understanding that there has been no increase in the price of Pumpkin or Mincemeat as compared to a year ago and, for your information, there has been no increase in the price for these pies charged to us by our other suppliers. In fact, the price on our Mincemeat Pie has been reduced. There certainly should be no increase in the cost of the shipping cases as this has become so competitive that on fruits and vegetables all suppliers on the West Coast are offering a 10% discount off list. We believe that if competitive bids are obtained, there will be no trouble in buying shipping cases for at least the same price as paid last year and possibly less. In fact, if you will tell us the price for cases on which you are basing your quotations, we will be happy to see if we can get a lower price from our regular supplier in California. Since he will be running large quantities of cases for our pies, he could handle the additional quantity possibly more economically than a special run with another supplier even though additional freight would be involved.

"Would you, therefore, please itemize for us the increase that is being charged for the 'extra reports and other requisites.' Possibly we can show you a way to reduce these charges.

"We are anxious to buy these pies from you, both for Salt Lake City and Denver, but this increase has certainly made it more difficult to do so.

"Please let us hear from you as soon as possible and see if we cannot work together to obtain a deal that would be profitable and worthwhile for both of us."

I will omit the last paragraph unless counsel wants it read.

Mr. Alioto: No, that is all right.

By Mr. Schafer:

[fol. 763] Q. Then, on August 28, Mr. Rigby, you reply, from Mr. Rigby to Mr. Young:

"Thank you for your prompt reply—we appreciate this

as we all know the Pumpkin and Mince Pie season is near at hand.

"In regards to our increased prices we realize they are above the 1960 price, but last year our price to you was at rock bottom as we were anxious to introduce our product to you and felt that giving this price we would have your business and perhaps work into something for the future.

"Our costs this year—"

And I won't go through that paragraph. I won't read the rest of that letter unless counsel wants me to.

Mr. Alioto: No, that is all right.

By Mr. Schafer;

Q. In respect to that paragraph regarding your rock bottom price in 1960, Mr. Rigby, that is the price at which you wrote the letter saying that that was justified by various cost savings, is that correct, Mr. Rigby?

A. That is true.

Q. On September 5, 1961, Mr. Young writes to yourself.

A. Yes, sir.

Mr. Alioto: Is it 1961 now?

Mr. Schafer: Have I been misreading the dates? They have all been in 1961, for sometime here.

Mr. Alioto: Thank you.

Mr. Schafer: The last two paragraphs are all I intend to read. The second to the last paragraph reads:

"Based on your quotations to date, we will not be able to include requirements for Denver."

And the last paragraph:

"Don't forget to let us have quotations on Boysenberry and Peach Pies as soon as possible."

By Mr. Schafer:

Q. And on September 8, 1961, Mr. Rigby, you write to Mr. Young giving him, I take it, a slightly lower quotation on mince and pumpkin pies, is that correct?

[fol. 764] A. If that's what you say, fine. Do you want me to refer back to these previous ones?

Q. No, that is all right. It is not material.

A. All right.

Q. The next to the last paragraph you state you are working on the quotations for boysenberry and peach and will send them along soon.

Then on September 13, 1961, a letter from yourself to Mr. Young. You state:

"With the additional contracts we have acquired this year we find we are very short on storage space. We are asking you to send us an order now for immediate delivery to your storage plant for—" a total of 3,000-6,000 cases.

"If you could do this we would appreciate and it would be a great help to us as we could then keep up with our fall orders."

By Mr. Schafer:

Q. You were very short on storage space in 1961, Mr. Rigby?

A. Not as I recall.

Q. Why did you then say that in this letter?

A. Well, the previous year Safeway would always—they wouldn't give us very much notice on their deliveries, and they cautioned us from the beginning to be careful not to make more pies than what they were going to use, because come, sometime in December, that they were going to shut right off and they wouldn't buy any more pumpkin and mince pies, and they didn't want to have a lot of pumpkin and mince pies on hand.

They wouldn't give us very advance orders on these, and sometimes it kind of put us in a bind to get their pies out specially when we had our others to get out, so we felt if we could make a few ahead and get a few pies ahead of us, they wouldn't be able to put a bind on us like they did the previous year. Also, we asked that they give us a little more notice on their orders, which they did do this year we are referring to.

Q. You had additional contracts in 1961, September, is that right?

A. As I recall, we sold them pumpkin—we sold them some pies. We did not sell them mince pies, as I recall. They shipped us several thousand pumpkin cartons and several thousand mince cartons, and they got here—we opened them up and started running them through our machines, and they had changed locks on us and never notified us. It was a great surprise to us. And he write back and he said, "I didn't think it make any difference." [fol. 765] But it made a great deal of difference. They had the old-styled cartons in pumpkin and the new-style cartons they had in mince. We could pack the pumpkin, but not the mince for that reason, and we did not know about it until the cartons got here themselves, and we had to ship all the cartons back.

Q. My question was: Did you have additional contracts in September of 1961?

A. For pumpkin business.

Q. Just pumpkin?

A. Pumpkin and mince.

Q. What business was that? Who were the customers?

A. Bel Air, Safeway.

Q. Here you are writing to Safeway, and you are saying: "With the additional contracts we have acquired this year."

A. Oh, that we had acquired?

Q. Yes.

A. Our other customers. Our volume had increased over the previous year considerably.

Q. And that wasn't the reason that you found yourself very short on storage space?

A. Not entirely, no.

Q. Partially, at least.

A. Partially, sure.

Q. On September 18, 1961, Mr. Young writes back to you and he says in part:

"Your request for an order for immediate delivery of 6,000 cases of pie is a completely new factor and quite an impossible one for us to comply with. We assumed, since you said nothing differently, that the deal would be the same as last year and you would pack ahead sufficiently far so you could meet all orders as they are placed."

Then skipping a few lines, unless counsel wants me to read it, he says the Salt Lake City Division definitely does not have the kind of space in which they can take 6,000 cases at a time, that if they were to take delivery and put it into cold storage in Utah Ice "(at our expense) we would be of course adding considerably to the cost of the pie and this was not taken into account in figuring the delivered price."

Do you recall having received that letter, Mr. Rigby?

Q. And then on September 22, 1961 you write to Mr. Young in respect to the matter we were just talking about, and you say that it is impossible for you to run the mince pies during that year under the Bel Air label due to the change of carton style that you knew nothing about.

A. True.

Q. It would cost you $1200 for an attachment plus three hours to change the machine and would take six weeks to get the special part needed.

A. Right.

[fol. 766] Q. So that you asked for his advice as to where to ship the mince cartons.

Does that mean you didn't do the mince business for Bel Air that year, Mr. Rigby?

A. That's true. We had, I think, oh, just enough for maybe five or six hundred cases of cartons left from the previous year. We made those and that was all.

Q. On October 26, 1961 you write—Mr. Young writes and again requests quotations on boysenberry and peach pies as previously requested in his August 17 letter, some three months beforehand. The letter states in full:

"You frequently complain that you are not getting any business from us except on Pumpkin and Mince and, there-

fore, you cannot make any changes that we request. However, you still have not replied to our letter of August 17 requesting quotations on Boysenberry and Peach Pies.

"Maybe we can get together on these flavors and possibly others, however, it is impossible if it takes over two months to reply to letters."

Then on November 22, 1961—and I take it now, Mr. Rigby, we are in a period after this case has been instituted, is that right?

A. That is true.

Q. And here is a letter from yourself to Mr. Young:

"It has not been intentional in delaying our letter to you giving a quotation on Boysenberry and Peach Pies, but matters beyond our control have caused this delay.

"Due to legal matters we are still unable to make this quotation—we hope that we will be able to give this to you before very long.

"We are interested in getting more of your business and regret very much that right now we have to ask your indulgence in giving us more time."

Have you ever rendered a quotation to them on boysenberry and peach?

Mr. Alioto: Is this after the filing of the complaint?

[fol. 767] Mr. Schafer: Yes. The letter is and everything is.

Mr. Alioto: I object to it on that ground, if your Honor please.

The Court: Sustained.

Mr. Schafer: These last three letters in the pile I think we have already read to the jury, and I don't want to do it again if we have.

The Court: That is fine. I want to encourage you in that.

We are going to take a recess now. Don't talk about the case. Come back at two o'clock.

* * * * * * *

By Mr. Schafer:

Q. When we recessed, Mr. Rigby, we were talking generally about the Safeway business and the matter of price differential between Bel Air brand and the Utah brand; and now I want to ask you whether or not, Mr. Rigby, there is any difference in the marketing of the Roundup Sonny Boy label, say, as against the Frost 'N' Flame label.

A. Is there any difference in marketing?

Q. Yes, your marketing techniques or marketing costs?

A. No.

Q. Now, then, Mr. Rigby, if there are no such differences between the Sonny Boy label and the Frost 'N' Flame label, are there any cost differences to accounnt for the difference in price from time to time appearing as between Sonny Boy and Frost 'N' Flame?

A. There are—yes, there are a few things.

Q. What would they be?

A. Well, in the Mayfair—or, the Frost 'N' Flame label, we own that label. We have invested a great deal of money in the label and in the plates, engraving plates. In case of the Sonny Boy, they have spent their money on the engraving plates, which are very expensive, and so there is a difference there.

[fol. 768] Q. Is the difference sufficient to account for the difference in price?

A. No. Well, not a great deal of difference.

Q. How about as between Bel Air and Sonny Boy? Is there a difference in price appearing from time to time between those two labels?

A. There might be. I don't know. I don't have the record in front of me.

Q. If there is, is there any difference in the method of manufacture or delivery or sale of those brands?

A. Yes.

Q. What is that?

A. There is a difference in transportation.

Q. Well, you mean—you quote, do you not, on the Bel Air, you quote both f.ob. your own plant and f.o.b. the Safeway warehouse?

A. Yes. We gave a quote on those.

Q. Yes. So that if Safeway picked up at its warehouse, it would be—at your—I'm sorry—at your plant—the arrangement would be similar to the Roundup arrangement, would it not?

A. Well, the quotes we gave on the Bel Air under those arrangements were on their own label, on their own—their fruit pies, basically, to be shipped in other areas outside of the city.

Q. I'm talking about your Bel Air pumpkin and mince, the only two Bel Air products that you sold.

A. I don't think we gave them a quotation f.o.b. our plant, and also f.o.b. their warehouse here in Salt Lake City.

Q. Is that the only difference referred to in respect of the Bel Air and the Sonny Boy labels? One might be delivered to Safeway's warehouse, and the other might be delivered f.o.b. your plant?

A. Well, no, we have to have our own man deliver to the warehouse here. But in turn, on Sonny Boy, the common carrier truck comes, he backs his truck up to our door, and he loads them on the truck. All we have to do is have a man out there with a fork lift and lift them up in the truck, and he takes them from there.

Q. When you quoted to Safeway on the same type of delivery, you quoted a three cent differential?

A. Yes.

Q. So that apart from that three cents possible differential resulting from different methods of delivery, would there be any other differences in the marketing of the two brands sufficient to account for the difference in price from time to time appearing?

A. No, I wouldn't think so. Not that I know of.

Q. In respect of the Sonny Boy label as against the Frost 'N' Flame label, do you make, Mr. Rigby, the same

amount of profit, or do you make more profit on one than the other, or what?

A. I don't know.

Q. Are your costs of manufacture the same for two?

A. Yes.

[fol. 769] Q. And if your price to Sonny Boy is generally lower than the Frost 'N' Flame, would that not indicate that you make less profit on the Sonny Boy than on the Frost 'N' Flame?

A. Might do.

Q. Now, the correspondence that we read this morning, Mr. Rigby, in 1960, one of your letters recounts that in 1960 you quote a rock bottom price to Safeway. Do you recall that expression?

A. Yes, sir.

Q. And that in 1961 you raised your prices to Safeway?

A. Yes, sir.

Q. And Safeway objected and said they were a little bit too high. Do you recall that?

A. Yes, sir.

Q. And you testified that in 1960 your differences in price as between Bel Air, say, pumpkin and mince, and your Utah label pumpkin and mince were accounted for by different methods of sales; is that correct?

A. Partially, yes, sir.

Q. Now, just partially?

A. Well, along with the other, advertising and promotion and store demonstrations.

Q. That's what I include by "methods of sale."

A. All right.

Q. And they are a partial justification for the cost justification?

Mr. Alioto: Now, excuse me, if your Honor please. There is an ambiguity in the record at this point. And counsel could—not try to take advantage of it, but might assert it later on. When you have been using methods of

sale, apparently the witness has not been including all of the categories. So his statement that it only accounts for partially appears to be in relation just to your language, "methods of sale." I just wanted to make that point, so that there won't be any question about it later on that you weren't afforded an opportunity to clear that up.

By Mr. Schafer:

Q. By "methods of sale," Mr. Rigby, I have been intending to mean all of the promotional and advertising efforts and what have you that you've testified to. Do you understand that?

A. Yes, sir.

Q. And so that your methods of sale are a partial justification for the difference in price as between the Bel Air and the Utah label; is that correct—

A. Yes, sir.

Q. —in 1960?

A. Yes.

Q. How about in 1961 when you raised the price to Safeway? Was that—there was still existent, was there not, a difference in the price as between the Safeway pumpkin and mince under the Bel Air label and the Utah pumpkin and mince under the Utah label?

A. Bel Air was cheaper, is that what you mean?

[fol. 770] Q. That's right.

A. Yes.

Q. It was less cheap than it was in 1960, but it was cheaper?

A. Yes, sir.

Q. And that was in 1961?

A. Yes, sir.

Q. And you had no advertising expenditures in 1961, am I not correct?

A. On which?

Q. On anything in 1961. Utah label. I'm sorry. In 1961.

A. We had no advertising expenditures? I wouldn't

know. I don't—I'm—I know we had co-op advertising in 1961.

Q. I was thinking of a more general advertising program.

A. I don't know. I don't recall.

Q. Do you know whether or not there was any justification in terms of costs to you of the difference between the 1961 Bel Air and the 1961 Utah label pumpkin and mince?

A. Difference in cost?

Q. Where there were any differences in costs sufficient to justify the differences in price.

A. I don't understand what you mean.

Q. There were differences in price between the two labels; is that correct?

A. Between the Utah Pie label—

Q. Yes.

A. —and the Bel Air? Yes, there was a cost difference.

Q. And—

A. I mean, a price difference.

Q. Price difference. Now, do you know whether or not there were any cost differences sufficient to make that difference in price?

A. I wouldn't know.

Q. And am I correct in understanding that none of the records maintained by your company would disclose whether or not there were such cost differences?

A. That I don't know.

Q. Have your costs, Mr. Rigby, increased or decreased over the years involved in this action?

A. Our costs?

Q. Yes.

A. They've decreased.

Q. Your costs have decreased?

A. Yes.

Q. I understood—is it not true that your complaint alleges the costs have increased?

Mr. Alioto: There seems to be an ambiguity here on the definition of costs. It's an obvious ambiguity. When you're talking about costs, are you talking in relation to a man purchasing the pies, or his manufacturing costs?

Mr. Schafer: I'm talking about your costs, not your prices. Your costs of manufacture of your pies.

By Mr. Schafer:

Q. Have they decreased or increased over the years involved?

[fol. 771] A. It costs us less today to make a pie than it did two years ago.

Q. Your complaint alleges, is it not true, that your costs have increased?

A. The way our—they have increased in ingredients, yes, you bet, but with the volume we are doing the cost per unit has gone down. Our labor and overhead costs have gone down because of our increased volume, but yet, the costs of the ingredients, labor and—per hour—has gone up. Fruit has gone up, flower has gone up a little, and other things, they have gone up, but yet our over-all costs have gone down because of our increased volume.

So that you have not been compelled to absorb any increased costs without a compensating increase in price?

Mr. Alioto: Your Honor please, I think that's argumentative. Is he speaking of costs now in the sense of his labor rates and ingredient costs?

Mr. Schafer: I'm talking about the total complex of costs, what's relevant.

Mr. Alioto: All right.

The Witness: Would you state the question again?

By Mr. Schafer:

Q. You have not been compelled, I take it, then, Mr. Rigby, to absorb any increased costs, because you haven't had any increased costs, if I understand your testimony correctly?

The Court: I understood him to say he did have some increased costs.

Mr. Alioto: That's the point, Judge.

Mr. Schafer: Compensated for, however, your Honor, by increased volume, which gave him a lower unit cost. Let's talk in terms of unit cost, if that's a clearer way to do it.

By Mr. Schafer:

Q. Your unit costs, costs per pie, have gone down?

The Court: A single pie—

[fol. 772] Mr. Schafer: Or a dozen.

The Court: A single pie doesn't compensate for much. You're talking about units, unit costs.

The Witness: I thought I stated that. It costs us less to make a pie per dozen now than it did two—

By Mr. Schafer:

Q. All right. I'll leave it there. And you've been getting this increased volume, I take it, through 1961 and 1962?

A. Yes.

Q. And it's this increased volume that's accounted for the lower unit costs?

The Court: Now, that's repetitious.

Mr. Schafer: I didn't understand if he had those years. That's all I wanted to know, whether it was those years that he got lower unit costs.

The Witness: Gee, I don't have the records in front of me that tells us our costs, so it's hard for me to answer the question.

The Court: Why, if you don't know, you don't answer.

The Witness: I actually don't know without looking at the records. I can't answer that.

By Mr. Schafer:

Q. It's in 1961 and 2 that your volume has increased very substantially, is it not, sir?

A. Increased each year since we've been in business.

Q. Yes.

A. But so has the market.

Q. Am I correct in understanding—well, I shouldn't ask that. That's a very good question. Now, I understood from the testimony yesterday that you have a freight allowance to your customer in Ogden on certain flavors; is that correct?

A. On the Utah—on some certain flavors under the Utah Pie label.

Q. So that the man in Ogden—that price on the Utah label, you say?

A. Yes, sir.

Q. And that price, what does it run? $3.30 for cherry, or something? Can we take that as a figure?

A. No, it's not that cheap.

Q. What is the number? $3.50? About that?

A. Yes. Or $3.60—

[fol. 773] Q. So the purchaser of a Utah label cherry pie in Salt Lake City buys it from you at $3.60?

A. Yes.

Q. And the purchaser of a Utah cherry pie located in Ogden buys it from you $3.50?

A. No.

Q. All right. Then I don't understand your testimony. He buys it $3.60 less ten cents freight allowance; is that right?

A. No. Well, let me explain it this way. They buy them for the same price. In Salt Lake City we have two major customers that buy Utah pies, under the Utah Pie label. Safeway, Utah Wholesale. We give them what is known as a quantity discount, because they're located here. They buy them in volume. By doing so—on these pies that are not net. On the net prices, there is no quantity discount.

Just, oh—well—so they buy, say, on cherry pie they get—buy them for $3.70, and we give them a ten cent a dozen quantity discount. So their net price is $3.60 in Salt Lake City. And the ones that are outside of Salt Lake City, they haul them to their destination, and then distribute them. We charge them $3.70 and give them a ten cent a dozen pickup allowance, which is $3.60. They buy them for the same price.

Q. In one case you give them ten cents, and you call it a freight allowance? And in one case, you call it a quantity discount?

A. Right.

Q. Suppose the fellow in Ogden buys the same amount as the fellow in Safeway. Do you give them both allowances?

A. No, sir.

Q. How about another customer, such as, take, Booth Fisheries. When he buys a Utah label cherry pie, he buys them $3.70?

A. Yes.

Q. And he doesn't get a quantity discount?

A. No, sir.

Q. So in respect to that customer, you're selling him at $3.70, and you're selling to the fellow up in Ogden at $3.70 minus ten cents.

A. He picks them up and hauls them up there.

Q. That's right.

A. Booth Fisheries is in Salt Lake City. He doesn't have to haul them any place.

Q. That's right. I was a little confused by the testimony, Mr. Rigby, in respect to this business of forcing down your prices. And your complaint reads that this alleged conspiracy began on or about June, 1959. And I wondered why you picked that date, June, 1959.

Mr. Alioto: If your Honor please, this is a matter of taking a complaint again, which is drawn by an attorney. He can ask him about what the facts are that relate to it.

Mr. Schafer: That's what I—

[fol. 774] Mr. Alioto: He didn't draw the complaint. I did. I drew the complaint.

The Court: You're not asking that at all. You're asking why he picked 1959 to put in his complaint.

Mr. Schafer: I'll rephrase it, your Honor.

By Mr. Schafer:

Q. What are the facts, Mr. Rigby, that induced you to put June of 1959 in your complaint?

Mr. Alioto: He didn't. I object on that ground, if your Honor please.

Mr. Schafer: Your Honor, under Rule 11, your Honor, the plaintiff has to know that the facts alleged are to his knowledge true.

Mr. Alioto: I understand—

Mr. Schafer: It's his complaint.

The Court: Objection sustained.

By Mr. Schafer:

Q. Did this price start going down, Mr. Rigby, in 1959, about June of 1959?

A. No, sir. They went down before that. They started back in 1950—the late part of 1957, early part of '58.

Q. '57? That was before you were in business? Right?

A. No, sir. The last part of '57.

Q. I'm sorry. I misunderstood you.

A. The early part of '58. That's when they started going down.

Q. When did they start going down drastically, if I might use that expression?

Mr. Alioto: Well, I don't understand the expression, when did they start going down drastically.

Mr. Schafer: I'm picking up from his own deposition.

Mr. Alioto: I understand that. But you're asking him a question, "When did they start going down drastically?"

And I don't understand that question. I submit on this that it's not intelligible, if your Honor please.

[fol. 775] Mr. Schafer: On this deposition, your Honor, he did testify as to when that was.

Mr. Alioto: Well, that's a different thing. I think you ought to ask him a question here. We're going to object to the form of that question, if your Honor please, whether it started going down drastically, in the light of the facts we have in the record here.

The Court: The objection is sustained.

Mr. Schafer: May I read a Q. and A. from the deposition, your Honor?

The Court: No, you may not. Ask a question, if you want to ask a question.

By Mr. Schafer:

Q. In your opinion, Mr. Rigby, did prices start going down drastically at any point?

The Court: What is it?

Mr. Schafer: In his opinion did prices start going down drastically at any point.

Mr. Alioto: If your Honor please, I submit that we have the actual price deterioration from 1958 down, and the question as asked is unintelligible. There's no definition of the word "drastic." Do you mean by ten cents, twenty cents, or thirty cents? What is a drastic—

Mr. Schafer: The witness was able to testify on his deposition in express language.

The Court: I'm not going to listen to any argument.

Mr. Schafer: I'm not going to argue. I thought you wanted me to say something.

The Court: No. Far from it.

By Mr. Schafer:

Q. Now, Mr. Rigby, in respect to the allegation in your complaint that the defendants have raised their prices in

other states—neighboring states is the language—in order to compensate for the low prices in Salt Lake City, can you state for us on what facts you relied in making that allegation?

[fol. 776] Mr. Alioto: If your Honor please, one of this may have been a proper question in the desposition. At this stage of the game, to ask him to summarize all of the facts—they're all in evidence here. This is where they are.

The Court: Yes. Sustained. The same problem. You've gone through the depositions, and you've converted into questions, statements in those depositions. Now, that's not the way to ask questions.

By Mr. Schafer:

Q. Now, Mr. Rigby, you have made money every year, as I understand it, that you have been in the frozen pie business, is that correct?

A. That is true.

Q. You made more money in your fiscal year 1961 than you had in any other year, is that not correct?

A. I believe so, yes, sir.

Q. And I think it is true, is it not, that after the complaint you took the American Foods business away from Morton Company, is that correct?

A. After the complaint?

Q. Yes, in early 1962, if you want to be more precise.

A. We took the business away from Morton?

Q. Yes.

A. I wouldn't think so, no.

Q. Is it not a fact that your Mayfresh label is now being handled by the American Food Stores?

A. That is true.

Q. Do you know whether or not the American Food Stores is purchasing any pies from Morton at all, fruit pies?

A. Since that time?

Q. Yes.
A. I wouldn't know.
Q. You don't know?
A. No.
Q. And you are selling more pies than you ever had before, as I understand it?
A. I will rephrase—I will change my answer to that. Yes, they have bought Morton pies since that time.
Q. Fruit pies, I am talking about.
A. Fruit pies?
Q. Yes.
A. That I don't know, about fruit pies.
Q. You are selling more pies than you ever had before, as I understand it?
[fol. 777] A. Our volume has increased, yes, sir.

By Mr. Schafer:

Q. And you are making money on all those pies that you are selling?
A. We are making some money, but not the money we would like to make.
Q. I suppose we all would like to make more money, Mr. Rigby, but you are making some money on all those pies?
A. Not selling below cost, no, sir.
Q. And during 1962 am I correct in understanding, Mr. Rigby, that you haven't lost any business to the Morton Company in the fruit pie business?

Mr. Alioto: I submit, if your Honor please, what happened after the complaint is not relevant to the inquiry at this time. We will object on that ground.
Mr. Schafer: It is relevant to the same issue I suggested this morning, your Honor.
Mr. Alioto: As to liability, we will object, your Honor. What happened in 1962—
Mr. Schafer: I am offering it as part of the general picture of the competitive activity in the market place, your Honor.

The Court: Sustained.

Mr. Alioto: What are these, counsel?

Mr. Schafer: We were told that these are all—that is evidence of every payment made on an advertising allowance by the Utah Pie Company.

Mr. Alioto: We have no objection.

Mr. Schafer: Okay, if they might be just marked as a group.

The Court: Received.

(Defendant's Exhibit M-87 was thereupon marked for identification and received in evidence.)

(Defendant's Exhibit M-88 was thereupon marked for identification.)

[fol. 778] Mr. Alioto: No objection.

The Court: Received.

(The document marked Defendant's Exhibit M-88 for identification was received in evidence.)

By Mr. Schafer:

Q. Now, Mr. Rigby, your private label business, I think you testified this morning—private label pies do compete with the other brand pies, is that correct?

A. Yes, sir.

Q. And, in that regard, Frost 'N' Flame pies compete with Utah label pies?

Mr. Alioto: If your Honor please, he went all over this. He said this at least four times this morning.

The Court: Oh, yes, repetitious.

By Mr. Schafer:

Q. Your private label pie sales increased substantially in volume, did they not, Mr. Rigby, from 1959 to 1960?

A. To 1960?

Q. Yes.

A. Yes, it increased.

Q. And can we assume from the basis of what you testified to this morning that that increase could possibly have been derived, at least in part, from your Utah label sales?

A. I am not sure I understand your question.

Q. If private label pies, including your own, compete with other brand pies, including your own, isn't it a logical conclusion that your Frost 'N' Flame pies may have picked up some of the business that you formerly had under the Utah label?

A. It is possible, but not probable.

Q. Why isn't it probable?

A. Well, because we were selling—because the business has increased each year, the over-all market picture of the frozen pie industry has increased a great deal. There are many, many more people eating frozen pies today than there were four or five years ago. The percentage of people buying them has increased tremendously. So, therefore, I don't think that our Utah pie sales have hurt our Frost 'N' Flame sales a great deal.

Q. Do you mean that in the reverse of what you just said?

A. Yes, I do. I don't think our Utah pie sales has hurt our Frost—no, you were right the first time. I am sorry.

Q. Isn't it true that, in respect to, say, one particular customer, such as the AG Stores, that they were buying substantial quantities of the Utah label pie in 1959 from you?

[fol. 779] A. Again, I will have to go back and think of when we started with our Frost 'N' Flame.

Q. February of 1960.

A. They bought some.

Q. And in 1960 AG started buying a lot of your Frost 'N' Flame pies?

A. Yes, sir.

Q. And is it not a fact that they purchased a lesser volume of your Utah label pies in 1960?

A. Yes, sir. But, in turn, our other customers increased our Utah pie sales.

Q. I am speaking about the one customer, Mr. Rigby. It is a possibility, is it not, that your Frost 'N' Flame pie sales could have picked up some of the business you formerly had under the Utah label?

A. It is possible.

Q. And, as I understand your assumptions, or your marketing conclusions that were the foundation of your Exhibit 94, you assumed that your Utah label business would stay constant and not be affected by your private label business. Am I correct in that understanding?

A. With the increasing of business and the greater amount of people buying frozen pies, that is my conclusion, that the Utah Pie label should have stayed within a reasonable amount, a reasonable amount of sales each year; percentage of market share should have stayed about the same.

Q. A reasonable percentage of the market share?

A. About the same as it was in the previous years. It should have stayed about the same, should not have decreased.

Q. The year which you used as your base was 1958, is that correct?

A. That is true.

Q. And in that year you had 70 per cent of the business, is that correct?

A. That's what the survey shows.

Q. Do you understand that that figure is used as the basis for the computations expressed in Exhibit 94?

A. I am not sure what Exhibit 94 is.

Mr. Alioto: If your Honor please, Exhibit 94. What is Exhibit 94? So he will know what you are speaking of.

Mr. Schafer: It is your damage exhibit, Mr. Alioto.

Mr. Alioto: I know that, but the witness doesn't know them by number. We may know them by number. The witness doesn't. Show it to him.

Mr. Schafer: I don't have a copy, frankly.

[fol. 780] The Court: Suppose we leave that alone and move on to something else.

By Mr. Schafer:

Q. Are you familiar with this exhibit?

A. I have looked at it.

Mr. Alioto: Now, if your Honor please, here is an exhibit that was not prepared by the witness. I thought he was talking about his estimates. This exhibit was prepared by Mr. Caldwell.

Mr. Schafer: I thought the testimony was that all those arithmetical computations were based upon the conclusions of Mr. Rigby, as the marketing expert of the company.

Mr. Alioto: Not all of them with respect to the percentage of market shares, no, particularly not that one. He wasn't asked about that.

Mr. Schafer: When we asked Mr. Caldwell—

The Court: Don't argue it.

Mr. Schafer: Is it your Honor's ruling that I should not ask any questions on that exhibit? I didn't understand.

The Court: That is an omnibus situation to get me into, now, isn't it? "Is it your Honor's wish that I shouldn't ask any more questions about an exhibit?" You have a handful of exhibits there. I don't know what you are talking about in a question like that. You ask the questions, Mr. Alioto will make the objections, and I will make the exclusions.

Mr. Schafer: Your Honor, I understand Mr. Alioto made an objection to my pending question, and I didn't understand—

The Court: Sustained.

Mr. Schafer: I didn't understand if there had been a ruling.

By Mr. Schafer:

Q. Now, Mr. Rigby, I understand that you concluded that your company lost a stated amount of sales by reason

of the alleged violations of law expressed in your complaint, is that correct?

A. That's true.

[fol. 781] Q. And that it was on those calculations of yours that this damage exhibit was prepared. Is that correct, as far as you know?

Mr. Alioto: In whole or in part?

Mr. Schafer: Well, just that that was one of the basic, underlying assumptions—

The Court: Well, we are not getting anywhere talking about that. This exhibit was prepared by Mr. Caldwell, and Mr. Caldwell used whatever materials he felt it necessary to use. Now, I suppose part of it was based upon what Mr. —

Mr. Billings, I am talking to counsel.

Mr. Billings: I beg your pardon.

The Court: I am not in the habit of having counsel go over there and engage in a conversation while the Court is carrying on a conversation with him.

Mr. Billings: I beg your pardon.

The Court: And come back here and sit down. The objection is sustained.

Now, what is going on over here?

Mr. Schafer: I am trying—I am having a colloquy with Mr. Alioto about what the bases are—

The Court: You might let the Court in on what is going on over there.

Mr. Schafer: Mr. Alioto and I are discussing—

The Court: Do you want a recess to talk over this thing with Mr. Alioto?

Mr. Schafer: I would appreciate that, your Honor.

The Court: All right. All you have to do is ask for it.

Mr. Schafer: Thank you very much.

[fol. 782] The Court: Don't talk about the case, ladies and gentlemen.

(Recess had.)

The Court: You may proceed.

Mr. Schafer: Your Honor, I think I'll close. I'd like simply to offer into evidence the copies of additional answers to interrogatories of defendant Carnation Company under date of September 30, 1961, signed by Mr. Gaylen Rigby.

Mr. Alioto: You mean the Utah Pie's—

Mr. Schafer: Answers to Carnation's interrogatories. I don't have a clean copy. I'll have to get it.

Mr. Alioto: You're offering all of them?

Mr. Schafer: I'm offering Number 24 and Number 28, to be precise.

Mr. Alioto: Okay. I have no objection, if counsel wants them in.

The Court: Received.

(The exhibit marked Morton's Exhibit No. M-89 for identification was received in evidence.)

Mr. Schafer: Your Honor, in connection with the witness's testimony, we did subpoena his invoices; and Mr. Alioto and I have an arrangement whereby somebody can go over there and check those invoices. I'd like to have it understood, if I may, that the results of that tabulation could be inserted into the record as soon as completed.

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[fol. 783] Cross examination.

By Mr. Lamb:

Q. Mr. Rigby, when you entered the frozen pie business in 1957, did you make a study of pricing in order to be able to price the pies that you were to make?

A. Did I make a study?

Q. Yes.

A. No, sir.

Q. Well, tell me what system you used to set a price for your frozen pies.

A. Being that we had a plant located here in Salt Lake City, with all of our advantages that we had, that we are local, and freight, and so on, we knew that we could not enter the market unless we could come up with a price that would interest the wholesalers in putting in our product. We knew we'd have to be a few pennies under our competition because of our locale.

Q. Now—are you finished?

A. No, sir.

Q. Excuse me.

A. So we talked to a broker. He was going to represent us. He looked over the situation, and we come up with a figure that we would enter the market with, that was $4.65 a dozen, at the price we had offered to our customers—the wholesalers—the customers here in Salt Lake City.

Q. Was the Pet Milk Company in the market at that time?

A. Yes, sir.

Q. And they were selling what pie?

A. Pet-Ritz pie?

Q. And do you know of your own personal knowledge how long they had been here in this market?

• • • • • • •

A. No, sir, I don't.

[fol. 784] By Mr. Lamb:

Q. The Pet Milk Company introduced a frozen pie into Salt Lake City at what time, in accordance with your knowledge?

A. Oh, I wouldn't know what year.

Q. Were they in here in 1956?

A. I don't know, sir.

Q. Well, where did you first learn about frozen pies?

A. Where did I first learn about them?

Q. First learn about them. Yes.

A. I guess the first time I ever heard about a frozen pie was back in about 1954.

Q. '54?

A. '55, something like that.

Q. What pies, what frozen pies were in the Salt Lake City market at the time that you entered the frozen pie business?

A. Pet and Carnation and Morton. I don't know if Chet's was here then or not. They came in shortly after.

Q. That's sufficient. But Pet was here. Now, it was your testimony that you in your pricing worked out a price with your broker that was a few pennies under those that were selling in the market here; is that correct?

A. Being that we had a freight advantage, yes, sir.

Q. Has it been your policy from the time you introduced your frozen pie line in Salt Lake City to continue to sell under the competition?

A. No, sir.

Q. Did you at any time ever sell at the same price as the Pet Milk Company?

A. I wouldn't know, sir.

Q. Your Utah Pie, you've testified, is a 24-ounce pie?

A. Yes, sir.

Q. And the Pet-Ritz pie is also a 24-ounce pie?

A. Yes, sir.

Q. Would you regard the Pet-Ritz pie as competing with your Utah pie in quality and in price, speaking of Pet-Ritz, now?

A. I would think the Pet-Ritz—Pet-Ritz pie, among others, would be competing with Utah Pie.

[fol. 785] Q. Because of its—it's of like-grade quality? It's 24-ounce, and it's a quality pie?

A. Not entirely, sir.

Q. Well, do you have any other reason?

A. Yes, sir. On the retail level—as far as I'm concerned, it doesn't make a lot of difference if a pie is 22-ounce or 24-ounce or 20-ounce. It has spacing in the cabinet, and I don't—I—it is my belief if a housewife or a man who is doing the shopping walked down a frozen food cabinet and

sees three pies there, one is a 20-ounce, one a 22, and one a 24, and they are marked, or, priced according to their weight, I think the majority of the women, being price conscious, would pick up the cheapest pie, even if it was a 20-ounce pie. Any pie that sells here is competition, regardless of the weight, because they're all in about the same—there is very very little difference—to look down upon it you have to look close to see if there's any difference in size. Very, very close. And most of them don't look that close.

Q. Mr. Rigby, I took your deposition on one occasion and asked you a question as to whether or not there was any difference between the 24-ounce pie and the 20-ounce pie.

A. Yes, sir.

Q. And you answered me that there was.

A. There is a difference.

Q. And that the 20-ounce pie, because it is of less weight and contains less fruit, should sell at a less price; is that correct?

A. It should, yes.

Q. And didn't you say at that time that the 20-ounce pie was a passing fancy? Do you recall having said that?

A. I may have said it. I don't recall it, but I may have said it.

Q. Your deposition shows that you did. Now, at that time, I also asked you why you didn't get into the 20-ounce pie. And do you recall what your answer was?

A. No, sir.

Mr. Alioto: If your Honor please, this is no way to prove depositions. There are legally accepted ways and evidence to prove depositions. Counsel should proceed in that fashion, not ask him if he recalls what he said.

Mr. Lamb: I've only one or two more questions, Mr. Alioto.

The Court: Overruled. You may proceed.

By Mr. Lamb:

Q. Have you at any time contemplated making a pie less than 24-ounces?

A. Under our own label?

Q. Yes.

A. No, sir.

[fol. 786] Q. Under any label?

A. We have made fresh at their request.

Q. Now, when I asked you that before, your answer was that you had a lot of cartons, and you couldn't get down to it, you wanted to use them up. Do you remember that?

A. No, sir. I may have said it.

Q. Well, anyway, it's your testimony that the 20-ounce pie is different from the 24-ounce pie and should be priced differently; is that correct?

A. Yes. But a 20-ounce pie and a 24-ounce pie, to look at it in a box, you have to be someone that's familiar with the frozen pies to tell the difference.

Q. Well, I won't argue with you, Mr. Rigby. Now, I'm going to ask you another question on pricing. You have testified that you sell your products, try to sell them, in Spokane, Denver, California, and some other places. Have you ever considered the possibility of changing from the f.o.b. system of procing to the delivered system of pricing?

A. No, sir.

Q. You never have considered it?

A. Not that I recall.

Q. Have you ever engaged a market research expert or anyone of that sort to advise you on how to best market your pie in areas other than Salt Lake City?

A. No, sir.

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By Mr. Lamb:

Q. Do you know whether or not of your own knowledge that frozen pies are generally sold on a delivered price basis?

A. Some do, some don't. Some are f.o.b.

Q. Some?

A. Yes.

Q. But a great number of them are sold on a delivered basis; isn't that a fact?

A. I don't know, to tell you the truth, I don't know.

Q. When you make a sale in Spokane, for example—

A. Yes, sir.

[fol. 787] Q. —is your customer interested in what the price of pie is here in Salt Lake, or is he interested in what he's going to have to pay laid down in Spokane?

A. He's interested in what he's going to have to pay in Spokane.

* * * * * * *

By Mr. Lamb:

Q. Do you know whether or not the 20-ounce pie was introduced into this market because a 24-ounce pie could not be sold at the prices prevailing?

A. Will you please repeat the question?

Q. Do you know whether or not the 20-ounce pie was introduced into this market because the 24-ounce pie could not be sold in competition with the low prices of other 24-ounce pies here, including Utah Pie?

A. No, I don't know that.

Cross-examination.

By Mr. Billings:

Q. Mr. Rigby, if I understand your testimony this morning, you stated that, in answer to one of Mr. Schafer's questions, that you first changed your price from $4.15 down to $4.00 in April of 1958. I believed you looked at the I.B.M. run and verified it. Is that correct, sir?

A. I believe so, yes.

Q. And, as I remember, you testified that was because of something that Carnation did?

A. I believe so, yes, sir.

Q. Now, I'll show you the 1958 list for apple pie, which is in evidence, the chart, and ask you just this question, Mr. Rigby. If the chart correctly represents the prices at which Carnation was offering and selling its pies in 1958, Carnation's price did not change until September of that year, isn't that correct?

Mr. Alioto: I submit, if your Honor please, first of all that that chart by stipulation was said not to contain the prices at which Carnation sold; simply a compilation of price lists.

[fol. 788] Mr. Billings: I asked him if it were so that that chart correctly represented the offering and selling, Mr. Alioto.

Mr. Alioto: Okay.

The Witness: Well, as I recall, the incident that occurred during this time, the reason we were forced to lower our prices. And I can remember of a number of examples where a wholesaler would call us and say, "We've just had another—had a better offer." And I do recall him using the name "Carnation," at least on two different times. He said: "Carnation has offered us a better price. You'll have to lower your price, or you're through. You've got to make a decision now."

Q. You don't know of your own knowledge—

Mr. Alioto: He didn't finish, counsel. You interrupted.

Mr. Billings: I'm sorry. I'm sorry.

The Witness: So we had to, unfortunately, discuss this in a hurry. He gave us no time to discuss—I mean, to ponder over it. But on two examples that I recall; he used Carnation as an example. "Carnation has given us a better price. To meet the price—you lower, or we're going to buy Carnation."

He told me that: "Being that you're local and you have freight advantage, you're going to have to lower your price."

So therefore we did lower our price to stay in business.

Q. That was based on what some buyer told you. Not anything that Carnation actually did, as far as you know? You don't know whether they actually made that offer to the buyer, or do you?

A. Well, I don't think the wholesaler would have said it unless he hadn't been offered it.

Q. Wouldn't the wholesaler be anxious to get you to cut your prices?

The Court: That's argumentative.

Mr. Alioto: That's argumentative, if your Honor please.

Mr. Billings: I think his anwer was argumentative, too, your Honor.

[fol. 789] The Court: I understood you were going to ask one question.

Mr. Billings: Well, I was trying to get him to answer the one question I asked, and that was—

The Court: It sounds to me like he answered it very fully.

Mr. Billings: Let me put it once more.

The Court: I think the question has been answered.

Mr. Billings: You mean I cannot ask this question, your Honor?

The Court: Well, you want to ask one more?

Mr. Billings: Just one question.

The Court: All right.

By Mr. Billings:

Q. I want you to listen very carefully, Mr. Rigby, and just answer this question, so we won't take any more time. Assuming this chart in evidence represents correctly the price at which Carnation was offering and selling its pies in 1958, Carnation did not cut its price, either offered or sold, until some six months after you did in 1958.

A. That's what the chart said. I'm going by what the wholesaler said.

Mr. Billings: All right. Thank you. That's all.

Redirect examination.

By Mr. Alioto:

Q. I have just a very few questions, Mr. Rigby, and I'll try to get them very concisely. When you lowered your price as a result of what the wholesaler told you, did you lower it generally in the area, or did you just lower it for one customer?

A. We lowered it to everybody.

Q. And when you came into the area, as you testified on Mr. Lamb's examination, when you came in a few pennies under competition, was it for everybody that you sold to?

A. Yes, sir.

Q. Now, Mr. Schafer asked you some questions about what he called "cost justification." Do you know what that term means? Let me put it another way. What did you think it meant when he used it to you, "cost justification"? [fol. 790] A. When he asked those questions, I thought he was referring to the cost of the manufacturing of the pie, was there any difference in the manufacturing of the pie.

Q. Okay. So that so far as the Utah Pie is concerned and the Frost 'N' Flame is concerned, the manufacture in the plant is substantially the same?

A. Yes, sir.

Q. Is that what you meant?

A. Yes, sir.

Q. Okay. And is that what you understood by his language, "cost justification"?

A. Yes, sir.

Q. Now, state the facts with respect to whether or not there are additional expenses in connection with marketing the Utah pie as against the Frost 'N' Flame pie.

A. There are many.

Q. And state what they are, very concisely and quickly.

A. Well, first—we don't have to put on another salesman to make retail cost. We have no advertising, no pro-

motion, no demonstrations, delivery is faster; all these things are taken into consideration.

Q. On the basis of all those things, do you have an opinion as to whether or not the difference in price is explained by the difference in your costs in marketing the total product?

A. Yes.

Mr. Schafer: Your Honor, I don't think he can testify to that. He testified he has no cost records at all, doesn't know if they exist.

Mr. Alioto: You don't have to have cost records—

The Court: Overruled.

By Mr. Alioto:

Q. Do you have such an opinion?

A. Yes, I have an opinion.

Q. Is this predicated upon your market experience and your experience in the industry?

A. Yes, sir.

Q. What is your opinion as to whether or not that difference in price is accounted for by a difference in cost?

A. I think so.

Q. Now, so far as your Sonny Boy label is concerned, is there any difference between the marketing of your Sonny Boy label and your Frost 'N' Flame label?

A. Yes, sir.

Q. And what is that difference? State the facts with respect to that.

A. First, Sonny Boy invested their own money in the plates, which is several thousand dollars. Secondly, they have to haul these pies from Salt Lake to Spokane. And thirdly is the method of loading the trucks and delivery.

Q. Now, state whether or not those differences in costs cover any differences in price that may have existed between those two pies.

A. I think there is.

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[fol. 791] By Mr. Alioto:

Q. All right. Do you own your Frost 'N' Flame label?

A. Yes, sir.

Q. Do you own your Sonny Boy label?

A. No, sir. I might add, we could lose the Sonny Boy label at any time.

Mr. Alioto: We have no further questions, if your Honor please.

Recross-examination.

By Mr. Schafer:

Q. You haven't done, I think you testified to me, sir, you haven't done any advertising on the Utah label in 1961?

A. I didn't say that.

Q. Have you done any advertising on the Utah label in '61?

A. I don't know.

Q. You don't know if you did or not?

A. We did some co-op advertising. Other than that, I don't know.

Q. Co-op advertising is where you take some money off the price and give it to the store? Is that right?

A. That's true.

Q. Have you done any advertising on your own account—

A. We have from time to time—

Q. —in '61?

A. We have from time to time spent money advertising on radio—

Q. In '61, now.

A. —television, and in the newspaper. Now, if there was any of that in '61, I couldn't tell you without looking at our records.

Q. So your testimony is in respect of 1961 you don't know whether you did any advertising or not on the Utah label?

A. On that medium, I don't know.

[fol. 792] Q. On any medium? My question is broader than that.

A. Yes. We did. We did some demonstrating in 1961, in-store demonstration, by serving pie.

Q. I was going to come to demonstrations in a moment. Mr. Rigby, I was thinking just of advertising.

A. I don't know. I would think—

The Court: You've been all over that. This is repetitious. It isn't proper redirect.

Mr. Schafer: I was trying to restrict myself—

The Court: Improper recross, rather.

Mr. Schafer: I was trying to restrict myself, your Honor, to what Mr. Alioto discussed on his redirect.

The Court: All right.

By Mr. Schafer:

Q. And you testified as to certain promotions, Mr. Rigby. Could you describe for us what those promotions were on the Utah label in 1961?

A. I said we had some in-store demonstrations.

Q. So when you said promotions and demonstrations, that meant the same thing; is that correct?

A. There was—yes, sir. In those regards—I don't know of any other promotions. There might have been some in '61, but I don't recall if there were.

Q. Now, demonstrations—do you mean by that, sir—I think you spoke of putting some cream, whipped cream, on top of a pumpkin pie. Is that the kind of thing you're talking about?

A. Right. Or apple pie, we put ice cream.

Q. Right. Now, how often does that occur in your business?

A. At that time—in the early part of '61 we were doing it three and four times a month.

Q. Three and four times a month?

A. We'd pick one store each week.

Q. And what stores did you pick?

A. The Albertson's—mostly Albertson stores and Valley Shopping Center stores.

Q. And did you have demonstrations in all the stores to whom you sold your Utah pies?

A. Not in all of them. We couldn't get around to all of them.

Q. Now, I wasn't sure I understood what cost differences you meant to identify as between the Sonny Boy label and the Frost 'N' Flame label, Mr. Rigby. You spoke of a haulage, and you heard my statement on that.

A. Yes.

[fol. 793] Q. I don't think you had any differences in haulage, did you, sir?

A. Yes, sir, on this—on the Frost and Flame we had to take our own men to load the truck, our own man to deliver them and unload the truck, which with Sonny Boy all we did was have one man out there with a fork lift, and he would lift them up in the truck, and the common carrier people would load the truck.

Q. And that's 3 cents a dozen? The way you computed? At least in the quotations of Safeway?

A. Approximately.

Q. Yes. But other than that 3 cents, what difference did you find between the two labels?

A. Their outlay in money towards the label.

Q. I was thinking of your differences in costs, sir, not the differences to the purchaser.

A. They furnished several thousand dollars in plates—in money to buy the plates, Sonny Boy. We furnished money in Frost and Flame. There was a difference there.

Q. You already owned the plate when you started the Frost and Flame arrangement; isn't that correct?

A. Yes. It's our money that's tied up in it.

Q. That's right. And you're free to sell the Frost and Flame label in any states other than Utah and Idaho; isn't that correct?

A. That's correct.

Q. Now, can you account for the differences in terms of cost, Mr. Rigby, between the Mayfresh label and the Sonny Boy label?

A. The same reasons.

Q. And how about as between Bel Air and Mayfresh?

A. The same reasons.

Q. When a buyer tells you that he's got a lower price, like in the Carnation episode that you were speaking about in 1958, did you check that out? Did you try to find out if he was telling you the truth?

A. As best I could.

Q. What kind of checks did you make?

A. He didn't give us a lot of time to check. He said, "I've got to know now."

Q. Well, did you check with anybody about it to see what you could find out about it?

A. I took his word for what he was saying to be true.

Q. Right. Now, am I not correct, Mr. Rigby, in my understanding, that you can make a smaller pie, a 22-ounce pie, or a 20-ounce pie, and in that way get some cost savings that you can relate to price; isn't that correct?

A. Oh, it can be done, yes, sir.

Q. And tell us just briefly, sir, why it is that when you lower your price to one customer, like in 1958, you lower it all through the market?

A. We try and treat all of our customers the same.

[fol. 794] Q. Is that for commercial reasons, or just for human ethical reasons, or what is it?

The Court: Oh, I think you've pursued that far enough.

Mr. Schafer: Could I ask if there's a business reason for that, your Honor? I think there is.

The Court: I don't see that it has any materiality whether there's a business reason for it. He says he does it, and he says he does it because they want to treat the customers all alike; and the business reason is perfectly evident.

Mr. Schafer: I think it is a sound business reason.

That's the reason, your Honor. I just want to have him say it.

The Court: I think it is, too. I think it's already in the record.

Mr. Schafer: I would request just a yes or no answer, but if you want me to stop, I'll stop.

The Court: All right.

By Mr. Schafer:

Q. Could you answer me yes or no to that, Mr. Rigby?

Mr. Alioto: What is your question? Human ethical—What is your question? See if you can clean the question up.

By Mr. Schafer:

Q. All right. Let me try and clean the question up. Is the reason that you quote the same price to everybody in the marketing area, Mr. Rigby, is the reason for that a business and commercial reason?

A. Well, we just like to treat all of our customers the same. That's the only thing I can answer to it.

Q. And that's because it's good business? Is that right?

A. I would think so. I don't know. Maybe someone else would think differently, but that's what we do.

[fol. 795] Donald Edwin Andersen, called as a witness on behalf of defendant Pet, being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Andersen, will you state your full name, please?

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Q. How long have you been with the Pet Milk Company.

A. It will be eight years this May.

Q. Were you engaged in sales work with Pet Milk Company?

A. With Pet Milk, yes.

Q. Did there come a time when you were requested to make a study of the advertising in the Salt Lake Tribune and the Deseret News?

A. Yes.

Q. Will you please tell us how you went about doing that.

A. I made the survey. My source of supply for this was the microfilm library at the Salt Lake Tribune. And I was requested to make a survey regarding the frozen pies. I was supposed to take the—look up the regular week-end ads that appeared in the newspaper, write down the name of the customer that advertised frozen pies, the price, the size, and the flavors that were advertised in the newspaper, and also the name of the pie that was advertised.

Q. In your position as salesman, will you tell me whether or not it is a custom to advertise on a particular day in Salt Lake.

A. Yes. Most of the—well, all the grocery stores, the chains that advertise usually on Wednesday or Thursday every week for the week-end ad.

Q. Mr. Andersen, I hand you—

Mr. Lamb: What is this number?

Mr. Alioto: It is already in evidence.

By Mr. Lamb:

Q. I hand you Morton's Exhibit No. 55 and ask you to tell me what that is.

A. Well, this first one is a survey, my survey, that I had taken, No. A-25, and the second one is a survey that I had a Mr. Paul Battiste take for me, since I didn't have time to take all the surveys.

[fol. 796] Q. Could you tell me whether or not, based on your own knowledge, that this is an accurate representa-

tion of all pie ads for those years that were contained in those two newspapers?

A. Yes, as far as my knowledge, it is, and ability.

* * * * * * *

Cross-examination.

By Mr. Alioto:

* * * * * * *

Q. Now, the mere fact that the ad—say, the mere fact that the first four-for-a-dollar ad may have been put in by one company doesn't prove, does it, that the sale by the pie manufacturer that may have brought about that may not have come at an earlier time?

A. I can't answer that.

Carrington Shields, called as a witness on behalf of the defendant Pet, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lamb:

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[fol. 797] (The document marked Pet's Exhibit No. A-26 for identification was received in evidence.)

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(The document marked Pet's Exhibit No. A-27 for identification was received in evidence.)

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[fol. 802] GEORGE D. WOHLHUETER, called as a witness on behalf of the defendants, having been heretofore duly sworn, testified further as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Wohlhueter has been sworn, your Honor. He has previously testified in this case. Mr. Wohlhueter, will you tell the jury your full name?

A. George D. Wohlheuter.

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[fol. 803] Q. Is it among your duties to prepare profit and loss statements?

A. That is right, yes, sir.

Q. Mr. Wohlhueter, I show you Plaintiff's Exhibit No. 7 in evidence and ask you if you recognize those statements.

A. Yes, sir, these are the financial statements that have been prepared for the Frozen Foods Division over the years beginning 1957.

Q. Now, Mr. Wohlhueter, I want you to describe for the jury—I'd like to have you select one page. Could you select one there that shows the total report for the—the year end report for 1958 as the illustration of—

Mr. Lamb: I don't intend to go through all these, your Honor. I just want to go through one that's representative of that period of time.

The Witness: Here, December '58 for the month and the year to date, for all sales divisions.

By Mr. Lamb:

Q. This is the total for that particular year?

A. That's right.

Q. Now, you have a column on this page which says "Budget." Now, what is that?

A. This is a plan based on what our sales departments expects to sell our product, the quantity it expects to sell, at the price that it expects to sell, and our cost of product at what we expect it costs us to produce this quantity of goods, and the various expenses we expect to incur in the selling and marketing of this product.

Q. Now, it shows here that you were budgeting in 1958 a price per dozen of five dollars and a half cents. Now, where did you get that figure?

A. Well, this is a blend of all of the various estimates of sales throughout the country, and at a selling price. The selling price was based on our previous averages realization per dozen.

Q. Your previous averages—you mean by that that in the previous year you collected the data of—your total sales and dollar realization, and divided the number of dozens into that, and arrived at that figure?

A. That is the way we averaged it, yes.

Q. It didn't make any difference what flavor it was?

A. I don't recall whether at this time we had a flavor analysis. I rather doubt that we did at this time. We do know by flavor, but at that time I don't think we had that information. It was just based on experience.

[fol. 804] Q. Now, you also projected that you were going to do some $6,400,000 worth of business. Where did you get that figure?

A. Well, that's merely a multiplication of our average realization times the sales department's estimate of the number of dozens to be sold.

Q. Did the sales department inform you where they got their data to supply you with that figure?

A. No, I don't know how they arrived at it. They did it by regions, because we have sales division P & L's at that time.

Q. Well, could you tell us where those divisions were? Let's simplify that. Did it include the Salt Lake City Division?

A. Yes. Salt Lake was a division.

Q. And you also had a budget for Salt Lake?

A. We did, yes.

Q. Did you use the national average price to calculate the budget for Salt Lake, or did you have a different price?

A. No, we had it by regions—or sales areas, because we budgeted a 505 realization for Salt Lake, and nationally it was 500½.

Q. And can you account for the difference?

A. This was our experience in Salt Lake. This was our experience nationally.

Q. Then, now, let's look at what's covered in this document. Will you tell the jury and the Court what's in it down to this point, down to the point of gross profit?

A. Yes, sir. The gross sales budget I've already explained is merely a mathematical calculation of the average realization from experience multiplied by the dozens that we expected to sell.

The next grouping of accounts are deductions from sales. These are items that are deducted from the face of the invoice, or for which we pay customers for spoils, shortages, declines. At this time we also considered freight on sales as a deduction from sales. At the present time this is considered as a selling expense. But we subtracted our deductions from sales—from our gross sales, and arrived at a net sales figure of 464½. Then we have the next item, which is cost of goods sold. This is how much it cost us to produce the goods and get it to the dock ready to be loaded onto the truck. This was estimated to be $3.81½ per dozen for this year, which then gives us a gross profit of 83 cents a dozen.

Q. All right. Now, will you tell the jury and the Court what comes in this general grouping, the next general large group? What's that?

A. Those are selling expenses. This is what it costs us to sell our product and get it into the hands of our customers.

[fol. 805] Q. Well, now, in that category, where do you get those figures when you're budgeting?

A. Some of them are based on experience. We know—as an example, we have a sales manager in each region, sales region. We know approximately what his salary is. We know what his traveling expenses are going to be. And we know what our brokerage commission rate is. And we apply that against how many dozen we expect to sell, to arrive at what our budgeted commission is. And then on experience we know what our warehousing expense has been. The rest of the items fall into what we call our promotion activity.

By Mr. Lamb:

Q. What is that?

A. This is supplied to us by our sales manager and our general manager. This is how much we plan to spend in the way of national advertising and TV or radio, how much in couponing, cooperative advertising, market research, store demonstrations, and samples.

Q. Now, I notice here advertising media, $401,627. Who makes the decision to spend that amount of money on frozen pie?

A. Mr. Lamb, that is the "actual" column. Do you want that column, or do you want the "budget" column.

Q. Well, give the "budget" column.

A. Budget column.

Q. We were talking about "budget."

A. $573,815 was budgeted for media advertising.

Q. Who makes that decision?

A. It is recommended by our sales manager and approved by the general manager, and eventually by the board when they approve the budget.

Q. Do you, as comptroller, have anything to do with that, with the setting of that figure?

A. No, sir, not that.

Q. Do you have anything to do with the setting of any of these figures?

A. Well, we supply the sales manager with what his experience has been on salesman expenses or salesmen's

salaries, or what the warehousing cost has been in the past. Those items are pretty definitely known. But this promotional area, he supplies us with that.

Q. Now, Mr. Wohlhueter, do you revise this budget as the year goes on or is that just a static thing that stays the same?

A. The budget stays the same once it has been approved. We frequently will prepare several different budgets before they are finally approved, however.

Q. Well, then, in this particular year, in 1958, you budgeted a loss of $649 and 423 cents.

A. No, 649 thousand.

Q. Six hundred forty-nine thousand, right. You budgeted that amount. Now, tell us what that meant. First of all, was that designed to put anybody out of business?

A. No, sir.

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[fol. 806] By Mr. Lamb:

Q. This $649,423, tell the court and the jury again what that means.

A. That is the loss that is expected to be sustained on this volume of business at this selling price and at this cost of material, with these selling expenses.

Q. Now, when the end of the year came along, you calculated what had actually happened. Is that what appears in the "actual" column here?

A. That is correct. It is the actual.

Q. What was the result that particular year?

A. The pretext loss was $921,270.

Q. Now, can you tell us what the total amount was for the Red Skelton show and for these in-store demonstrations and coupons and all this promotional? How much does that all add up to?

A. The total selling expense was $1,377,703.

Q. And what is that compared to the figure of loss, how much?

A. $921,270 loss.

Q. Does this statement, Mr. Wohlhueter, show that the promotional expense was the cause of the loss?

A. Was the major cause of the loss. The selling expense include items other than promotion, such as salesmen's salaries, expenses, and commissions; that they approximate the amount of the loss.

[fol. 807] Q. Will you turn to the year 1959 now, the full year.

Before we do this, Mr. Wohlhueter, will you tell me whether or not there were any changes in your accounting system, starting with the year 1958 through 1961?

A. We changed our format of presentation. We did not change our accounting system. We still collected all of our expenses in the same manner and figured our costs in the same manner, but we presented them in a different manner. As our business grew from a one-plant, four-flavor operation in 1955 to a 3,363,000-case business, with all its nationwide sales areas, we had to change our accounting to suit the situation so it would keep our management informed of what—how their operations were developing.

Q. How do you keep your accounting at this particular time, this year, 1962? Have you made any more changes?

A. Yes, sir, we have. It is rather minor, but it still is different in reporting, management reporting.

Q. Why have you made these changes?

A. In order to direct our management's attention to the problem areas as best we can.

Q. What do you mean by the "problem areas"?

A. Well, if a product line is having a loss, to show them whether it is in the cost of the product, whether it is in the selling of the product, whether it is in the sales realization, which product line is doing business better than others, which ones they could push, anything that will help them, in our opinion, that will help them to better run the business.

Q. Despite these losses that were budgeted, could you tell me whether or not the company was endeavoring to make a profit in 1958?

Mr. Alioto: If your Honor please, is this, again, a policy man, as to whether or not they were trying to make a profit?

Mr. Lamb: Within his knowledge, Mr. Alioto.

Mr. Alioto: I don't understand how you try to make a profit when you budget losses.

Mr. Lamb: He may be able to give you the answer.

Mr. Alioto: It wouldn't be competent, if your Honor please. It seems to me a policy man could answer that one.

Well, I will withdraw the objection. Go ahead if you want to.

[fol. 808] Mr. Lamb: Will you answer the question, Mr. Wohlhueter.

A. Not only in 1958, but in all the years, we were endeavoring to find ways to reduce our costs, our selling expenses, our warehousing, anything that we could to improve the profit picture, from our loss position.

By Mr. Lamb:

Q. Had the company been in the frozen foods division prior to 1955?

A. No. October 1, 1955.

Q. Within your own knowledge, this was a new venture, is that correct?

A. That is correct.

Q. State what your testimony is as to why these changes took place. To do what? Why did you change your accounting system? To do what?

A. To direct management's attention to the problem areas so they could improve their profit position.

Q. Now, did they improve in 1959? What happened in 1959 after this consideration?

A. In '59, 1959, we show a loss on this statement of $573,356 on our retail pie operation, but this is not the division's result. This is only for the pie operation.

Q. How does the total amount of promotion on the Red Skelton show and the in-store demonstrations and research,

and all those things that went into promoting the new product, how does that compare with the loss?

A. Well, again, selling expenses are $1,132,889 against a loss of $573,356.

Q. Tell us whether or not there was an improvement in that year.

A. Very definitely.

Q. How much of an improvement?

A. About four hundred thousand dollars, if my memory serves me, 350 thousand dollars.

Q. Will you turn to 1960. Do you have 1960?

A. Yes, I do have.

Q. Would you tell us how much you budgeted that year for a loss?

A. This budget is for $78,600 profit. Actual result: $77,226 loss.

Q. Is that for the whole year? Or are you reading from one month?

A. Fiscal year to date, December, '60.

Q. When did you change from a calendar year to a fiscal year?

A. During 1960 we had a three-month, what we call a short year, first three months of 1960. So our fiscal year ended March 31, 1961.

Q. Then you are just reading from—

A. I read through December 30, which is not a full fiscal year.

Q. Let's have a full fiscal year.

A. We budgeted 74,721 profit, and we lost—I am not sure of this figure—55,463.

[fol. 809] Q. Could you tell me how much you spent on promotion and in-store demonstrations and coupons, and all that sort of thing, that year?

A. I don't have the detail here, but, again, our selling expense was $1,150,000.

Q. But you definitely sliced your—according to those records, you sliced your losses considerably?

A. That is correct.

Q. Now, Mr. Wohlhueter, what is the present profit position of the Pet Milk Company in its frozen foods division?

A. When I left St. Louis, we were in the black; we had made approximately fifty thousand dollars in the first six months of this fiscal year.

Q. What have you done with all these expensive promotions? What has happened?

A. Our advertising budget, as I remember it, for the current fiscal year we are in was something like $26,000.

Q. Compared with what in 1958?

A. Well over a million—or approximately a million dollars in 1958.

* * * * * * *

Q. Mr. Wohlhueter, at the close of yesterday's session, you testified that Pet Milk Company made a net profit or is in a net profit position at this time; is that correct?

A. At the present time, yes, through December 31.

Q. Do you know whether or not that net profit position holds for all of the various markets in the country, or is it some markets in a profit position and others not?

A. We can't tell. We don't make our P & L, profit and loss statements, by areas. We make it on a nationwide basis.

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[fol. 810] By Mr. Lamb:

Q. Mr. Wohlhueter, will you point out the major changes in the profit position in the Pet Milk Company which brought us into a favorable position, as against an unfavorable one? What were those changes?

[fol. 811] A. We have drastically reduced our marketing, promotional, and advertising expenditures. We have improved our cost of production through mechanization of our production methods. We have considerably cut back on our warehousing costs by building warehouses at all

three of our locations to reduce storage costs on the outside. We have done a better job of scheduling our freight to reduce our freight costs. We have improved our rate structures on our deliveries.

Q. What about the product mix, so to speak?

A. We have added cream pies someplace in here. I don't recall the exact year. And this has been a high margin profit item for us, much better than our fruit pies, our basic flavor pies. We have also gone into other what we call specialty products that have added profit to our operations.

Q. Now, what percentage of the total Pet-Ritz business is represented by private label business, if you know?

A. I would have to guess. I don't know. Dollar volume?

Q. Yes. Is it a substantial percentage of the total?

A. Yes, it is.

Q. There has been some testimony here that Pet introduced a pie known as the Swiss Miss pie. Has that had any effect on the profit position of the Pet Milk Company?

A. It has expanded our distribution, and thereby, all of our products are able—the more volume we run through our plants, the lower our costs. This has improved our final profit picture with the additional volume.

Q. Mr. Wohlhueter, I'd like to have you turn your mind to this phrase, "cost justification," for a moment. In your position of controller of the company, has it been necessary for you to study cost justification?

A. Yes, it has.

Q. Will you tell the Court and jury what that is?

A. The law says that you cannot give preferential treatment to one customer over the—our regular customers. In the case of our private label business, we cannot give preferential price treatment to our private label customer as against our regular trade customers. So annually we go through a process which is called "cost justification" in which we compare the amount we realize from our private label business and the costs incurred thereof, against our customers, regular customers, trade customers, we call

them, the realization from them as compared to the cost incurred in selling those. And we each year prove that we do not give our Safeway Bel Air product preferential treatment in price.

Q. Now, have you studied this subject or any particular authorities that have given you the basis upon which you make these calculations?

[fol. 812] A. Yes, sir. I have read a document or a study made by Dr. Taggart of the, formerly, I believe, was a professor at the University of Michigan.

Q. Well, have you equipped yourself with any other criteria that you might use in order to arrive at the proper cost justification?

A. We have read everything that we could find that has been published on it, and we have consulted with our legal department each time after we have gone through this process of cost justifying.

Q. Are you familiar with the provision in the Safeway contract which was read by Mr. Alioto to the jury several days ago?

A. I am not sure I know exactly what you mean.

Q. Mr. Wohlhueter, I show you Plaintiff's Exhibit No. 42 and direct your attention to Paragraph 12 and ask you what that is?

A. Cost savings differential.

Q. What does it say? What is the substance of that?

A. In substance it says that we will cost justify our business with Safeway.

Mr. Lamb: Ladies and gentlemen of the jury, Mr. Alioto read this provision to you the other day, and it is an extremely important provision in this contract by the Safeway Company, and it is known as the cost savings differential. I will read it to you again.

"Seller represents and warrants that the differences between the price paid by the buyer and to the seller for the products sold hereunder and the prices at which the seller —" Pet Milk Company "—sells substantially similar prod-

ucts to its other customers will not exceed the savings realized by the seller in its cost of manufacture, sale, excluding brokerage or brokerage expense or delivery which results from different methods or quantities in which such products are sold and delivered by the seller to the buyer and by the seller to such other customers.

"It is agreed between the parties that on or about July 1, 1960 seller will review its pricing and cost structures to determine whether the prices quoted to the buyer herein should be revised upward to reflect possible changes in its cost of manufacture, sale or delivery which affect such sales."

By Mr. Lamb:

Q. Mr. Wohlhueter, as controller of the company, is it your responsibility to carry out that provision of the contract?

A. Yes. We do that every year.

Q. Now, Mr. Wohlhueter, I hand you Plaintiff's Exhibit No. 43 and ask you what that is?

A. This is a cost analysis of Pet-Ritz and Bel Air for the fiscal year 1961-62, in which we show a cost justification, that is, a cost difference over the price difference, of 7 cents a case.

[fol. 813] Q. What is that 7 cents? What does that represent?

A. This represents the amount—let's see if I can say it—our selling price is 42½ cents a case less on our Bel Air products than our Pet-Ritz product.

Q. All right, now stop right there. Will you now state for the jury the items of cost in the manufacture of the Bel Air line which do not exist, in contrast with those costs on the Pet-Ritz line, which is a product of like grade and quality. You have certain items that Pet-Ritz has to pay, and there are certain items that are not included in the Safeway contract because Safeway performs those themselves, is that correct?

A. That is correct.

Q. What are they?

A. Well, the first one is declines. We do not give any price protection on our Safeway Bel Air product, whereas we do protect—when we have a price change, we do protect our trade customers. We don't expend any money on the Bel Air line for samples, store demonstrations, sales promotional material, cooperative advertising, couponing, package design, market surveys, brokers' commissions, or distribution warehouse expense.

Q. You don't have to expend any monies on those items?

A. Safeway pays—if there is any of this done, Safeway does it themselves and pays for it.

Q. Is it correct to say that, subtracting that from the price of the Pet-Ritz pie that the two prices, that is, Pet-Ritz as against Bel Air, are comparable?

A. There are some other things on which we do expend money, but not nearly in proportion to the Safeway business.

Q. But you still do have a justification between the Pet-Ritz pie and the Bel Air pie?

A. That is correct, by 7 cents a case.

Q. Now, tell me whether or not the Pet Milk Company makes a profit out of the Safeway contract?

A. Yes, sir.

Q. How long has this contract been in existence? How long has the Safeway contract been in existence?

A. Since 1958, the fall of 1958.

Q. Has the Pet Milk Company made a profit on that contract in all the years it has been doing business with Safeway?

A. It has, yes.

Q. Mr. Wohlhueter, I show you Plaintiff's Exihibt No. 30, and ask you to tell me what that is?

A. These are the standard costs for the Fresno plant for each of the flavors of our Pet-Ritz pies and Swiss Miss for the years 1958 through 1962.

Q. Did you prepare that document?

A. It was prepared under my supervision, yes, sir.

Q. Now, what does that document represent?

[fol. 814] A. This is our estimated cost of producing Pet-Ritz and Swiss Miss pies during each of these years, as to the amount of ingredients, the amount of packaging costs, labor costs, and overhead assignment.

Q. Do I take it this is a projection at the beginning of the year which you expect to be the costs at this particular plant at Fresno?

A. Based on our estimated cost of our fruit, or packaging, our labor rate, volume of product going through the plant, this is our best estimate of what it will cost us to produce a given flavor of pie.

Q. Do you ever revise that as you go along throughout the year?

A. We do on occasion revise it for fruit changes, but once we establish a standard on the rest of the items, we leave them as they are until the end of the fiscal year.

Q. What happens at the end of the fiscal year?

A. We revise it and prepare a new standard based on our most recent experience.

Q. Is it a fact that also you reflect on your P & L statement precisely what the situation was? You know what your actual cost is at the end of the year?

A. Yes, we do.

Q. And that may be above or below this projection?

A. It never is exactly the same.

Q. In other words, I take it from you, that this is a management tool to try to find out throughout the year about where you stand?

A. That is correct. We can determine whether we are getting off base in any one of these areas through changes in cost.

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[fol. 815] By Mr. Lamb:

Q. Mr. Wohlhueter, I show you a document entitled "Pet-Ritz Food Division, Pet Milk Company, Sales and Earnings, Year to Date, December, 1959," which is in evidence, and ask you to tell me what that is.

A. This is a summary that shows our total for the year by the various product lines for sales and earnings for the year 1959.

Q. There is an item on this piece of paper called "Production Variances." What does that amount to?

A. The amount is $385,989.

Q. What is that item?

A. This is the amount that our actual costs varied favorably from our standard costs.

Q. And what did that figure do as far as your profit or loss was concerned?

A. This reduced our loss as reflected on our division sales statements.

Q. Now, I show you Plaintiff's Exhibit No. 27 and ask you what that is?

A. This is a summary prepared by Mr. Caldwell showing the representative loss per dozen in the Salt Lake area.

Q. I direct your attention to a date here, December 1, 1959, and ask you to tell me whether or not Mr. Caldwell took that $385,000 in cost variance, production variance, into consideration in drawing up this document.

A. No, he did not.

Q. Well, what would happen if he had taken it into consideration?

A. It would have reduced these costs as reflected on this statement by 23 cents a dozen.

Q. Then, the figure—

A. On the average, that is.

Q. Then, the figure at the end of the line should have been reduced by 23 cents? Is that your testimony?

A. That is correct.

Q. Now, Mr. Wohlhueter, are you familiar with the differences in price between the ex-warehouse and the full truck price?

A. I know there are differences, but I don't know the exact breaks on it, Mr. Lamb.

[fol. 816] Q. Well, do you know whether or not the full warehouse price is as much as 23 to 28 cents higher?

Mr. Alioto: He just said he doesn't know.

Mr. Lamb: What was the testimony—I'll withdraw the question, your Honor.

By Mr. Lamb:

Q. Will you state for me whether or not the prices contained in this document are full truck prices or are they ex-warehouse prices?

A. These are full truck prices.

Q. In other words, that's the lowest price that a customer would get?

A. That is correct.

Q. Do you know of your own knowledge whether or not the Pet Milk Company shipped any shipments into Salt Lake at the full truck price?

A. Not during this period of time, no, sir.

Q. What price should have been used, if this document was to be accurate?

A. We used our average—

Mr. Alioto: I object to the question as calling for an opinion and conclusion of the witness as to what price should have been used if the document should have been accurate. That's an argumentative question. He can ask what the fact is.

By Mr. Lamb:

Q. What is the fact—Thank you, Mr. Alioto—what is the fact with regard to the price that should have been there? What is the fact with regard to these prices?

A. We take our total amount of realization and divide it by the number of cases sold in order to arrive at an average realization, which is higher than this ex-truck price.

Q. Then if the actual price had been used and if consideration had been given to the $385,000 production variance, what would have happened to the loss position in the last column?

A. Well, we would have increased our realization and reduced our cost, and it would have affected this final loss figure considerably.

Q. Have you carefully analyzed that document?

A. I have gone over it, yes, sir.

Q. Does it reflect a true picture as far as the Pet Milk Company is concerned?

A. No, sir, it does not.

Mr. Lamb: Your Honor, I have a motion pending that this document be stricken from the record. At this time I'd like to move that it be stricken, on the grounds that it's inaccurate, that it was designed—

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[fol. 819] Mr. Lamb: Your Honor, it is our contention that the financial statements we put in the record are the best evidence. And this tabulation made by Mr. Caldwell is hypothetical in nature, and it must be obvious to the court and the jury that we are not in any way ashamed of the losses we had. We spent the money in promotion to put frozen pies on the market. We got consumer acceptance by that route. And our testimony will show that this was not done to put the Utah Pie Company out of business.

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[fol. 820] Mr. Alioto: If your Honor please, nobody is alleging that the mere fact you lose money proves that you violated the antitrust laws. But your Honor is aware, I am sure, of these two things. You don't have to take

judicial notice of them. I'm talking about a decision of the Tenth Circuit, the Ben Hur Coal Company against one of the other coal companies, in which Judge Murrah states that a continual selling below cost by a large corporation is evidence of an ulterior motive. Now, the case he was talking about involved a two-way violation, and the question there being whether or not there was certain anti-competitive effects which followed upon a discrimination in price. So that there's that authority for its admissibility.

And then the jury is to weigh in connection with that whether there could be any defense of good faith meeting of competition when you prognosticate your losses in advance, where in effect you have a price discrimination, which doesn't have to be a loss, as your Honor knows, but where you prognosticate losses in advance and you figure to sell in advance, whether you are then in a position to say that you lost money because you were meeting the competition of the Utah Pie Company in a specific situation. So obviously, that's very, very potent evidence. We're not alleging that selling at a loss is a violation of the anti-trust laws. We're simply alleging that it's evidence from which the jury may consider the question of the good faith meeting of competition under Section 2(a), and it's cer- [fol. 821] tainly evidence on the Section 2 count, the monopoly count.

So finally, if your Honor please, I simply submit that nobody is alleging what counsel claims we're alleging. The actual records have been put in evidence by us and show the actual loss.

We want to prove something else. We want to prove that they had to know in advance of issuing those price lists but if those price lists had been followed out and sales had been made on the basis of those price lists, that it had to result in a loss of approximately 55 cents a dozen. It actually resulted in a loss of 54 cents a dozen. It seems to me that's pretty good evidence.

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Mr. Lamb: I can make my argument before the jury, then, your Honor.

The Court: I think that is a jury question.

Mr. Lamb: Very well, sir.

The Court: I think that is a question the jury is entitled to consider.

Mr. Lamb: Very well.

Mr. Schafer: Your Honor, could I say just a word here. As you know, Mr. Caldwell made a similar study for the Morton Company, and I had planned at some point, your Honor, at the end, I thought, of the trial, to make the same motion to strike that Caldwell exhibit. Our witness did recompute the study on the basis of correct facts, and even on the Caldwell method we then have an exhibit in here on the correct facts. Morton, of course, has not prognosticated any losses at all, and I think the facts are quite different from this Pet exhibit. I would like to be able to argue it to your Honor at some point, that the original Caldwell study be stricken from the record and in its place the study worked up by our witness on the correct facts be substituted.

The Court: Of course, we will hear you. When do you want to do that?

Mr. Schafer: I thought your Honor would want to do it at the end of the trial, and I didn't mean to interrupt now. I am just trying to say now that I would like to make that argument later on.

[fol. 822] The Court: The motion to strike the Caldwell exhibit is denied. And while the jury is out, I will leave the courtroom briefly, take a little recess. This is one I asked for.

(Recess had.)

(Jury in the box.)

By Mr. Lamb:

Q. Mr. Wohlhueter, were you in the courtroom when Mr. Grant Caldwell testified with regard to this document?

A. I am quite sure I was, yes.

Q. Plaintiff's Exhibit 27.

A. Yes.

Q. And did Mr. Caldwell testify that, included in this brokerage and other direct selling—was there a warehouse cost included in that?

A. Yes, there is. One of these two columns. Either "Other Selling G&A," or in "Direct Expense," "Direct Selling Expenses."

Q. Now, it was your testimony that all these prices are full truck prices, is that right?

A. That is correct.

Q. Do you ever have a warehouse cost when it is a full truck price?

A. No, sir.

Mr. Lamb: That is all I have of this witness.

Mr. Alioto: May I have that exhibit you are talking about, the Caldwell exhibit. Does the witness have it?

Mr. Lamb: This is ours.

Mr. Alioto: All right, I have it.

Cross examination.

By Mr. Alioto:

Q. Now, the figure you are quarreling with Mr. Caldwell about is, I take it, the 55-cent figure, which is set opposite the price list of December 1, 1959, that is correct, is it not?

A. I wasn't quarreling; no, sir.

Q. Well, all right. The figure that you claim was wrong and innaccurate and misrepresentative, or whatever other words were used by your counsel, is this figure, isn't it, the figure December 1, 1959, which shows a 55-cent loss on that basis, 55-cent per dozen loss on that basis.

A. That is correct.

Q. That is correct, is it not?

A. That is correct.

[fol. 823] Q. Now, then, the evidence in this case, from your own records, a summary of your own records, indicates, does it not, that for that same month, December of 1959, you actually suffered a loss of 54 cents, as against Mr. Caldwell's 55-cent figure, isn't that correct? That is a summary of your—

A. Yes.

Q. I will give you your own records so there will be no argument about our summary being innaccurate, although your counsel has certified it is accurate. You actually show a loss of 54 cents, and Mr. Caldwell's study shows a loss of 55 cents, is that correct?

A. This is correct.

Q. Okay.

A. But it does not contain the production variances which I have previously mentioned that on the average for the year amounted to 23 cents a case.

Q. But your own record shows an actual loss, not a budgeted loss, of 54 cents, doesn't it, actual losses?

A. Yes, but this is before the variance, the production variance, that I referred to over here on this schedule.

Q. All right, fine. Now, then, your actual loss of 54 cents, you have testified, is on the basis of a higher price than the full truckload price?

A. That is correct.

Q. So that if you took your actual loss of 54 cents and converted it to a full truckload basis, as Mr. Caldwell's exhibit has done, your actual loss of 54 cents would show a greater loss, wouldn't it?

A. Yes, but you would also have to consider your production variances.

Q. I understand that. Thank you. That is all we have on this phase of it.

Now, with respect to your cost justification—

Mr. Alioto: Is 44 in evidence, or just marked?
The Clerk: Plaintiff's?
Mr. Alioto: Plaintiff's 44.
The Clerk: In evidence.
Mr. Alioto: Thank you.

By Mr. Alioto:

Q. I want to show you Plaintiff's Exhibit 44 in evidence, which purports to be a cost justification study of the Bel Air pies for the year 1961-62. Would you be good enough to tell us what fiscal year that covers?

[fol. 824] A. It covers from April 1, 1961 through March 31, 1962.

Q. 1962, thank you. Now, this shows that you sold in that period of time a million and a half Bel Air pies.

A. That is correct.

Q. Against a total distribution of sales of about 3,900,000, approximately, is that correct?

A. Of all Pet-Ritz and all Bel Air, yes, sir.

Q. Yes.

A. This is not total distribution, no, sir.

Q. So there is approximately 4,000,000 between Pet-Ritz and Bel Air?

A. That is right.

Q. Approximately 4,000,000 and about 40 per cent of that total is Bel Air, is that correct? In other words, you have a million and a half.

A. Yes, sir.

Q. More than a million and a half. So it is approximately 40 per cent of the total production of that approximately 4,000,000.

A. It is a little high, but it is close.

Q. Okay, it is close.

The Court: Is that four million pies or four million dozens?

The Witness: Four million cases.
The Court: Four million cases, and a case is two dozens?
The Witness: No, it is half a dozen, six pies.
Mr. Alioto: Two cases to a dozen.
The Court: Yes, all right. This is a case.
The Witness: This is a case, yes, sir.
The Court: Well, that is 24 million pies then.
Mr. Alioto: That would be correct.

By Mr. Alioto:

Q. In other words, it would be approximately 24 million pies, and 40 per cent of the 24 million pies are under the Bel Air label?

A. That is correct.

Q. That is correct. Now, then, this shows a cost dfference of how much between—on your own figures, now, a cost difference of how much between the Bel Air pie and your Pet-Ritz pie?

A. Cost—7 cents a case, if I understood you correctly.

Q. No, you didn't understand. The difference in costs.

[fol. 825] A. All costs?

Q. Yes, between your Bel Air pie on a per-case basis.

A. .4980 dollars.

Q. Forty-nine cents, is that correct?

A. Forty-nine cents.

Q. Approximately 49 cents difference between your difference in cost—and these include both the cost of manufacture and the cost of distribution, that is correct, is it not?

A. That is correct.

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By Mr. Alioto:

Q. At any point in the Salt Lake market where you have sold your pies to Safeway for distribution in the Salt Lake

market at a greater difference than the 49 cents, then, would involve a price difference or a price discrimination, wouldn't it?

Mr. Lamb: That calls for a conclusion of the witness.
The Court: Yes, I think it does.
Mr. Alioto: Okay.

By Mr. Alioto:

Q. Now, look at your study attached to the contract. That is the contract which is Exhibit 42 in evidence. That purports to set out for that year, 1960—this is a prior time than the exhibit before, so there won't be any question or confusion. That purports to set out a price differential for that year in Salt Lake City of 51 cents.

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[fol. 826] By Mr. Alioto:

Q. Now, your study of the facts of the contract shows a price difference in the Salt Lake City Market of 51 cents between Bel Air and Pet-Ritz, does it not?

A. That is correct.

Q. Now then, am I correct in assuming that Chart 2 of that same exhibit sets out the specific cost differentials from Fresno, Frankfort, and Chambersburg, not only on the cost of producing the two pies, but also on the cost of producing and selling the pies, the total cost? I'd like to get that cleared up.

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[fol. 827] By Mr. Alioto:

Q. Well, can you at least answer that question, Mr. Wohlhueter? Or I'll take a stipulation from counsel on it. I don't care how it's handled. Answer the question that those differentials that you have with respect to Fresno,

Frankfort, and Chambersburg, which happen to be your plants, are not only differentials in the actual cost of production in the plant, but include as well differentials in the total cost, including selling?

A. That is correct.

Mr. Lamb: I'll so stipluate that with you, Mr. Alioto.

Mr. Alioto: Fine, thank you. All right. Now, I suppose we—

The Court: Are you through with these?

Mr. Alioto: This confidential phase of it, yes.

The Court: All right. They can come back in, if anybody wants to.

By Mr. Alioto:

Q. Now, Mr. Wohlhueter, you were asked a great number of questions in the beginning of your examination by Mr. Lamb about the intensive advertising that was put behind your frozen food division in the early period of time; and you spoke of finally coming into the black or red or—I want to make something perfectly clear in the record, if I may. It is a fact, is it not, that certainly up to September of 1961 your company suffered nothing but losses in this Salt Lake market?

A. On an annual basis, yes, sir.

[fol. 828] Q. Yes. And furthermore, that those losses, those losses, were budgeted in advance?

A. No. Not all of them, no, sir.

Q. You mean not the full extent of them?

A. Not every year did we budget losses. As I recall, the schedules that Mr. Lamb showed me yesterday, one of them showed a budgeted profit. We sustained a loss—

Q. Do you have that schedule with you?

A. We sustained a loss, but it was budgeted as a profit.

Q. In other words, every year you sustained an actual loss right up until the time this complaint was filed?

A. That is correct.

Q. Now, it is a fact, is it not, that you didn't apportion all of your national advertising program, the Red Skelton program, for example, you didn't apportion the whole thing, of course, to the frozen food division?

A. No, sir.

Q. You apportioned only a part of it?

A. That is right.

Q. To the frozen food business?

A. That is correct.

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[fol. 829] Mr Lamb: I object, your Honor. Again, this is not in the province of this witness. I will have here as one of the witnesses, Mr. Shelby Robert, who was the director of marketing and had the responsibilities for marketing.

Mr. Alioto: This is preliminary, if your Honor please, to a statistical question.

The Court: Yes. Overruled.

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By Mr. Alioto:

Q. You identified Theodore Gamble, I believe, in prior testimony as the president of the Pet Milk Company?

[fol. 830] A. Pet Milk. That is correct.

Q. Have you ever heard Mr. Gamble expound his economic philosophy of investment spending in connection—

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By Mr. Alioto:

Q. I'll pick it up again. Have you ever heard Mr. Gamble expound his economic philosophy of investment spending in connection with the losses that the Pet Milk Company projected in its frozen pie business in the years '58, '59, '60?

A. Only the day his deposition was taken by you.

Q. And that's the only time you ever heard him speak on that subject?

A. That is correct.

Q. Has Mr. Gamble ever told you in substance or effect that he was prepared to lose a million dollars a year in

order to get a position or a national franchise position in the market?

Mr. Lamb: I object to this question.

Mr. Alioto: Has he ever told him that, is the question.

The Witness: I've never heard him express any opinion on it at all.

Mr. Alioto: Okay. We have no further questions.

[fol. 831] Redirect examination.

By Mr. Lamb:

Q. Mr. Wohlhueter, will you tell the Court and the jury again what "budgeting" means as far as the Pet Milk Company is concerned?

A. It is a projection of what we expect the results to be, based on certain circumstances, such as volume, selling price, cost of production, and marketing program.

Q. And where do you get the selling price upon which you can make that projection?

A. From our past history.

Q. In the case of the Salt Lake City Division where would you get the selling price?

A. From our realization in the prior year.

Q. In Salt Lake City?

A. Yes. In Salt Lake City Division. Not the City of Salt Lake.

Q. Now, that selling price, is that the Pet selling price, or is it the selling price that is the lowest selling price in the market?

A. It's the average of all of the sales.

Q. In the market?

A. In the market.

Q. And would those sales include the Utah Pie Company in this area?

A. No. All of Pet's sales in the market.

Q. Now, Mr. Alioto asked you whether or not we had gained in the market in 1958. There is in the record this

fragment from the Utah State professor's study, and let's review again for you here and for the jury precisely what the situation was. In 19—

Mr. Alioto: If your Honor please, I assume he can read it to the jury without asking the witness anything about it.

Mr. Lamb: I'm not going to read it to the jury. I'm refreshing his memory. He has opportunity to see this; and I think picking out one year, the jury should know about this at this time.

In 1958, the Utah Pie Company sold in this market 37,969 dozens of pies. The Pet Milk Company sold in this market in 1958 9,336. Nine thousand as against 37,000. In 1959, the year in which the Bel Air brand came in here, the Pet Milk Company— I mean, the Utah Pie Company, sold 38,372 cases. Pet Milk sold 39,639, one thousand cases more. In 1960, the Utah Pie Company sold 83,894 cases, against 51,480 for Pet. 15,000 against 83,000 for the Utah Pie Company.

In 1961 the Utah Pie Company sold 102,690 cases in this market, and the Pet Milk Company sold 66,786.

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[fol. 833] Boyd Frederick Schenk, called as a witness on behalf of the defendant Pet, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Schenk, will you state your full name?
A. Boyd Frederick Schenk.
Q. And what is your address?
A. 733 Craigwoods Drive, Kirkwood 22, Missouri.

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Q. What is your position with the Pet Milk Company?

A. I'm general manager of the frozen foods division of Pet Milk Company.

Q. How long have you been in the employ of Pet Milk Company?

A. A little over fifteen years.

Q. Would you tell us what position you had when you first started? And give us the various positions throughout the fifteen years.

A. I started with the Pet Milk Company as a laboratory technician in the laboratory of the evaporated milk plant at Buhl, Idaho. And subsequent to that I was a management trainee. And then supervisor or second assistant manager at the Buhl plant. In 1952 I was transferred to Orland, California, with their evaporated milk plant as their first assistant manager. In 1956 I was transferred to what was then the Pet-Ritz Division, which had been recently organized, as plant manager of the Fresno, California, plant, which we began to build in 1956.

Q. And how long were you plant manager in Fresno?

A. I was in Fresno as plant manager until the fall of 1958, when I was transferred to St. Louis as assistant to the general manager of the Pet-Ritz division. I was fruit procurement—I had fruit procurement responsibilities, and any other duties assigned by the assistant—or, by the general manager.

Q. In your capacity as plant manager at Fresno, did you ever honor requests by competitors to go through the Fresno plant?

A. Yes, we did. I didn't finish my history, Mr. Lamb.

Q. Proceed with your history.

A. In 1959 I was made production manager of, frozen foods production manager, in the milk products division of Pet Milk Company. And then in the fall of *1969*—or, '61, I was made general manager of the newly created frozen foods division.

[fol. 834] Q. Now, when you were plant manager of the Fresno plant, did you honor invitations by competitors to come in and visit your plant?

A. Yes, we did.

Q. Did any of your competitors invite you to visit their plants?

A. Yes, it was on a reciprocal basis.

Q. Can you tell me how many visits you made to competitors' plants where you were invited?

A. I visited Bradley's plant near Portland, Oregon, Bradley's plant at Yamhill, Oregon, I've been in the Del Mar Foods plant in Watsonville, California, Bright Foods in Turlock, California, Helms Bakeries in Los Angeles, Holiday Foods in Union, Missouri, Bluebird Pie Company in Dayton, Ohio, Mullers Grocery and Baking Company in Grand Rapids, Michigan, Lady Myer Company in Philadelphia, and possibly others.

Q. When you were plant manager in Fresno, was there ever a time when you detected a competitor who was an uninvited guest going through your plant?

A. Not while I was plant manager. It has happened.

Q. Did you know of any such instance? And who it was?

Mr. Alioto: I submit, if your Honor please, that if he knew of any such instance when he wasn't there it would be obvious hearsay. I'd object to it on that ground.

Mr. Lamb: He said it was not when he was plant manager.

Mr. Alioto: Was he there when it happened?

By Mr. Lamb:

Q. Were you there in a different capacity?

A. It was reported to me in my capacity—

Mr. Alioto: Well, that's what I mean, if your Honor please.

The Court: Sustained.

By Mr. Lamb:

Q. Now, Mr. Schenk, where were you on or about June 15, 1969? Were you in this area?

A. Yes, I was on vacation.

Q. Where were you having this vacation?

A. In southern Idaho. Twin Falls and Rupert.

Q. Did you come to Salt Lake at that time?

A. Yes.

Q. Did you make a visit to the Utah Pie plant?

A. Yes, I did.

Q. Who were the people that were with you when you made that visit?

A. I can't recall their names. A couple of people that I met that morning when I went through the plant.

[fol. 835] Q. Did you tell the folks of the Utah Pie plant that you were interested in possibly representing them in the Pacific Northwest as a broker?

A. They were told that, yes.

Q. Was it your idea to tell them that?

A. No.

Q. But nevertheless you were represented as such.

A. Yes. I participated in it.

Q. Now, if you personally were going to do this, what would you have done?

Mr. Alioto: Objected to, if your Honor please, on the grounds that it is incompetent and irrelevant and immaterial.

The Court: Sustained.

Mr. Lamb: I withdraw the question.

By Mr. Lamb:

Q. How do you feel about this visit?

Mr. Alioto: That's objected to, if your Honor please, on the grounds that it's not relevant to any issue in this case.

The Court: Sustained.

By Mr. Lamb:

Q. I'll hand you, Mr. Schenk, Plaintiff's Exhibit No. 38 and ask you what that is.

A. This appears to be a duplicated copy of a report that I made after I returned to St. Louis.

Q. And what does that report consist of?

A. It consists of a group of paragraphs showing my evaluation of the particular operation that I saw.

Q. How long were you in the Utah Pie plant?

A. Oh, I would say less than an hour. Thirty minutes to an hour, something like that.

Q. Who is this report directed to?

A. Mr. D. T. Dittman.

Q. Did Mr. Dittman ever convey that, the substance of that report, to anyone in the Safeway Company?

Mr. Alioto: That's objected to, if your Honor please, on the grounds it calls for obvious hearsay, what somebody else did.

By Mr. Lamb:

Q. Mr. Schenk, did you ever convey the contents of that document to anyone in the Safeway Company?

A. No, sir.

Q. There is testimony here that there was a request made by Mr. Al Smith of the Pet Milk Company asking for permission for a member of the Rigby family to make a visit in the Fresno plant of the Pet Milk Company, and that that visit was turned down. Now, it was fixed as [fol. 836] sometime around June 21, 1961, when it happened. Would you tell me, if you know of your own personal knowledge, why such visits were curtailed at that time?

A. Yes. Mr. Smith had been a frequent visitor to our plant and had brought other people to our plant without objection; but at that particular time we were in the process of doing some experimental work with a new type of fruit mixing device which we had developed and which was subsequently being patented, so we were restricting visitors to our plant during that particular time.

Q. If that hadn't been underway, would your company have honored a request to visit the plant?

Mr. Alioto: That is objected to, if your Honor please, on the ground it is not relevant to the subject matter, what would have been done under different circumstances.

The Court: Sustained.

By Mr. Lamb:

Q. Mr. Schenk, if you had this to do over, would you have asked the Utah Pie Company for an opportunity to visit their plant and reciprocate by having someone from their plant go through yours?

A. Yes.

Mr. Alioto: That is objected to on the ground it is not relevant to the subject matter of this litigation, and I move the answer be stricken.

The Court: Sustained, and the answer is stricken.

Mr. Lamb: I have no further questions.

Cross-examination.

By Mr. Alioto:

Q. Mr. Schenk, would you be good enough to tell the Court and jury what your position was in June of 1960?

A. Yes. I was frozen food production manager.

Q. Frozen food production manager. And as such, would you have had general jurisdiction of your frozen food plants?

A. Yes.

Q. How long a period of time had you been the actual manager of your Fresno plant?

A. I managed the Fresno plant for a period of about two and a half years.

Q. And what period of time was that, Mr. Schenk?

[fol. 837] A. That was from March of 1956 until September of 1958.

Q. Now, in that period of time you testified that you made a personal visit and inspection of a plant that you designated as Bright Packing Company, was that the name of it?

A. Bright Foods, I believe it was properly called.

Q. Bright Foods. Bright Foods was a packer for the Morton Company, wasn't it?

A. They pack several private labels. They pack primarily private labels.

Mr. Alioto: Do you want to read that question?

(Question read.)

A. I can't say whether they were packing for Morton at that particular time. I know they have packed for Morton.

Q. Do you recall approximately when it was that you visited the packing plant, the Bright Packing plant?

A. No, I can't recall that.

Q. Would it be at a time when you were the manager of the Fresno plant?

A. Yes.

Q. That would be a period after 1956, then?

A. Yes.

Q. Do you recall when it was that you visited the Del Mar plant in Watsonville?

A. Yes. About six months ago. I had been in the Del Mar plant previously, because we had purchased apples from them.

Q. Six months ago when you visited the Del Mar plant, it was packing pies, I take it, for the Morton Company?

A. Yes, that is correct.

Q. Were there any Morton employees present on that occasion?

A. I have no idea.

Q. Was the plant manager present on that occasion?

A. I didn't meet the plant manager.

Q. Whose permission did you seek in order to get into the plant?

A. Mr. Berelson's.

Q. Who is he?

A. He has something to do with the sales of apples from that particular plant.

Q. He was an employee of Del Mar, was he?

A. I suspect so, yes.

Q. Have you ever visited any pie plants in Torrance, California?

A. No.

Q. Do you know Mr. Dick Dowell of Cannery Sales?

A. I met him the morning that I went through this particular operation, and the name was on this report which Mr. Lamb showed me.

[fol. 838] Q. How did you happen to get in touch with Mr. Dick Dowell?

A. I was advised that he was the one that I should contact.

Q. Who advised you to contact him?

A. A Mr. George Donald.

Q. And who was Mr. George Donald?

A. Mr. Donald was connected with the Cloverleaf Dairy here in Salt Lake City.

Q. When you talked to Mr. Dick Dowell, were you introduced to him as Mr. Boyd F. Schenk of the Pet Milk Company?

A. I introduced myself.

Q. As what?

A. Mr. Boyd F. Schenk, Pet Milk Company.

Q. Do you know Mr. Bill Elgrett, or Eggett, the other man mentioned in the report?

A. I met him also that morning.

Q. The first time that morning?

A. Yes.

Q. And were you introduced to him as Mr. Boyd F. Schenk of the Pet Milk Company?

A. Yes. I also performed that same function.

Q. So both of these men knew you were identified with the Pet Milk Company?

A. Yes.

Q. I take it you then had some conversation with Mr. Eggett and Mr. Dick Dowell about the importance of concealing your identity from the Rigbys?

A. Yes, this was suggested.
Q. Was it suggested by you?
A. No.
Q. By whom was it suggested?
A. I can't recall. One of the other men.
Q. Where did you meet Mr. Dowell and Mr. Eggett?
A. I met them at a warehouse over here somewhere by the railroad tracks.
Q. And were there just the three of you there at the time?
A. Yes.

* * * * * * *

By Mr. Aliotó:

Q. State whether or not—state the substance of the conversation that you three people had about getting into the Utah Pie Company under false pretenses, if you had such conversation.

Mr. Lamb: I object to that, your Honor.
The Court: I don't think that is objectionable. Overruled.

[fol. 839] A. I can't recall the conversation, but it was decided that this was the way it should be done.
Q. Did you participate in that decision?
A. I certainly went along with it.
Q. Didn't you, in fact, suggest the decision?
A. No.
Q. Then the three of you agreed at this warehouse near the railroad track, you say—
A. Yes.
Q. The three of you agreed at this warehouse that you would go to the Utah Pie plant and one or the other of you would make a statement about what your intentions would be in connection with Utah Pie?
A. That's correct.
Q. Did you agree, before you got to the Utah Pie Company plant, that the statement would be made to the Rigbys

that you were interested in selling their product in the Pacific Northwest?

A. I don't recall exactly, but it was agreed that there—that they would be misled and that I would be represented as an individual who was interested in going into the brokerage business.

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Q. In any event, it was agreed, was it not, that your identity as a representative of the Pet Milk Company would be concealed?

A. Correct.

[fol. 840] Q. Did you state to either Mr. Dowell or Mr. Eggett what your purpose was in attempting to secure entrance into the Utah Pie plant on this basis?

A. No, I don't believe there was any discussion at that time.

Q. Is it not a fact, Mr. Schenk, that shortly prior to that time you had had a conversation with Mr. Alan Young of the Safeway Company?

A. I had talked with him periodically, yes.

Q. Is it not a fact that you talked with him shortly before you went into the Utah Pie plant?

A. I have no idea.

Q. Do you remember that prior to the time you went into the Utah Pie plant Mr. Alan Young had told you, in substance or effect, that he was thinking of giving the fruit flavor pies to the Utah Pie Company for this Utah area and the Denver area?

A. I don't recall Mr. Young ever telling me that.

Q. Did Mr. Young tell you, in substance or effect, that this is the one packer he had found besides you folks who he was interested in having pies packed with?

Mr. Alioto: That is kind of a goofy sentence. Let me change it.

By Mr. Alioto:

Q. Did Mr. Young tell you, in substance or effect, that the Utah Pie Company was the first processor that he felt

was capable of producing for him, in addition to yourselves?

A. Yes. As a matter of fact, they had produced for him.

Q. Did he tell you this?

A. Yes.

Q. Approximately when was it? How long prior to June 23 of 1960 did Mr. Young tell you that?

A. I can't recall.

Q. Where were you and Mr. Young when he told you this?

A. In his office.

Q. Where?

A. In San Francisco or Oakland.

Q. And who else was present?

A. Some of the calls that I made on Mr. Young I made by myself; other calls were made with various other people in our company.

Q. Do you recall when it was in 1960, if we can put it as general as that, that you visited Mr. Young in San Francisco, at which time you discussed the Utah Pie Company?

A. No, I can't recall.

Q. Would it have been within six months of June, 1960?

A. I have no idea.

Q. Tell us everything you remember about what Mr. Young said to you on the subject that the Utah Pie Company was the first processor he felt capable of producing for Safeway in addition to Pet Milk Company.

[fol. 841] Mr. Lamb: I object, your Honor, on the grounds it is hearsay.

Mr. Alioto: What Mr. Young told him? I will submit that objection.

Mr. Lamb: All right.

The Court: Overruled.

A. I don't recall that Mr. Young exactly, in so many words, said this, but he had allowed Utah Pie Company to pack Bel Air pies, and this was the first other company whom he had allowed to pack Bel Air pies.

Q. I want to read to you from your memorandum dated July 19, 1960, relating to your visit to the Utah Pie Company of June 23, 1960. You say as follows:

"As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young. Some of these are quite easily remedied and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves."

Now, would you be good enough to state all of the conversations you have ever had with Mr. Young on that subject matter on the ability of the Utah Pie Company to produce for him, the only other being able to produce for him, other than the Pet Milk Company.

A. The very fact that he allowed them to produce for him would lead me to this conclusion. I can't recall any direct conversations with Mr. Young where he expressed it.

Q. At or about this time you were negotiating with Mr. Young, were you not, in connection with the renewal of your contract, the Safeway contract?

A. No. As frozen foods production manager I had no negotiations.

Q. A man named Mr. Dittman was negotiating with them at that time?

A. This I don't know.

Q. Well, let's go over this memorandum and we will reach that point in it. This memorandum is written to Mr. D. T. Dittman?

A. Right.

Q. After you left the Utah plant, did you make notes of what you had seen there?

A. No.

Q. You mean that you simply dictated this letter approximately a month later without having had any intervening notes?

[fol. 842] A. I may have jotted down one or two things, such as the names of these individuals. That is about it.

Q. Did you dictate this letter, this memorandum, when you were back in St. Louis?

A. Yes.

Q. Did you tell any of your superiors in St. Louis how you had secured access to the Utah Pie Company plant?

A. No.

Q. You wrote this memorandum—in addition to Mr. Dittman, you wrote it to Mr. L. G. Leutweiler. Would you be good enough to identify him?

A. He is vice president of production for the Milk Products Division, my immediate superior at that time.

Q. And you wrote it to Mr. Gordon Ellis. Who is he?

A. He was president of the Milk Products Division, or general manager at that time.

Q. And you also wrote it to Mr. S. P. Harter.

A. Senior vice president of the company.

Q. These were all men in a position to recommend advancement for you in the company, weren't they?

A. Yes.

Q. And I take it you were trying to impress them with the fact that you had accomplished something great for the company when you wrote this memorandum?

Mr. Lamb: I object, your Honor.

The Court: Overruled.

A. This is a very factual report. I don't think there is anything very great in it personally.

By Mr. Alioto:

Q. I take it you were trying to impress them with the fact that you had secured this competitive knowledge?

A. This is not true.

Q. You knew at the time, didn't you, that your Safeway business was a very important item of the Pet Milk Company?

A. Yes.

Q. You have, since this time, been promoted to the head of the Frozen Food Division, have you?

A. Correct.

Q. How long after June 23 of 1960 did you receive that promotion.

A. October of 1961.

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Q. How many pies have you sold to Safeway within the past year?

[fol. 843] A. Actual number of pies I can't answer. It is a substantial volume.

Q. Would it be close to two million?

A. I think it is less than that.

Q. A million and a half?

A. Somewhere in that neighborhood.

Q. A million and a half. Now, in this last paragraph you state as follows:

"As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young. Some of these are quite easily remedied and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves."

Then follows this sentence that I would like to direct your attention to:

"The points you might use are:—"

And then you list a number of, presumably what are defects.

When you used that language to Mr. Dittman, "The points you might use are the following," you meant, didn't you, "The points you might use with Mr. Young to spite these people are"? Isn't that what that means?

A. I would say, in comparing the operations, that these points could be brought up, yes.

Q. If you don't like my language, does that not mean, "The points you might use with Mr. Young to disparage Utah Pie, as against our organization, are"?

Mr. Lamb: I object, your Honor. This is a characterization. It is up to the jury to decide, based upon the evidence and the testimony, whether or not this is so.

The Court: Overruled.

Mr. Alioto: I am asking the writer what he meant.

The Court: Overruled.

A. I would not use the word "disparage."

By Mr. Alioto:

Q. All right. Then tell me, you meant, in substance or effect, didn't you by that language to Mr. Dittman that, [fol. 844] "The points you might use in your negotiations with Safeway to prevent them from dealing with the Utah Pie Company are the following"? Doesn't it mean that, in substance, now, Mr. Schenk?

A. In substance.

Q. Doesn't it really mean that?

A. Yes, in substance.

Q. You therefore expected—how long had you known Mr. Dittman prior to this time?

A. I first met Mr. Dittman in, oh, within the first five years after I came to work for Pet Milk Company.

Q. So you had known him for appoximately how long in 1960?

A. Approximately ten years.

Q. Had Mr. Dittman, prior to this time, asked you to secure some ammunition for him that he could use against the Utah Pie Company?

A. I would prefer to think that he asked me to get some information that he could use to promote our own particular products, rather than against any particular—

Q. Did Mr. Dittman, then, in effect, ask you to get information about the Utah Pie Company prior to this June 23 visit to the Utah Pie Company plant?

A. I can't recall whether Mr. Dittman specifically asked that or not.

Q. You believed at the time you wrote this memorandum, however, that he wanted this kind of information?

A. I felt that it would be helpful to him, yes.

Q. It would be helpful to do what?

A. To promote the sale of our own products and our own services.

Q. As against the Utah Pie Company?

A. As against any or all competition.

Q. Specifically on this memorandum, as against the Utah Pie Company?

A. Yes.

Q. Whom you recognized at this time as the only other processor who was really in the running, is that correct?

A. Yes.

Q. Now, these things that you mentioned, these things that you mentioned as points against the Utah Pie Company, and which you suggested to Mr. Dittman he might use, let me go over them:

"1. Hot starch method instead of instant.

"2. Slower freezing.

"3. Lack of technical quality control personnel.

"4. Storage of mixed fruit in 55-gallon non-stainless drums prior to being used.

"5. Fruit mixture at too high temperature prior to use.

"6. No covers on storage vessels or filler hopper.

"7. No metal traps in lines.

[fol. 845] "8. No non-ferrous metal detector."

All of these points that you mentioned were points that you believed could be used against the Utah Pie Company, were they not?

A. These were all points that Safeway requires in their operations, and I am sure that Utah Pie Company was aware of them also.

Q. You knew, didn't you, that there wasn't any one of those points that couldn't be very easily remedied in the event that the Utah Pie Company secured an order for Safeway for all of its pies in Utah and Colorado?

A. I think I so stated in the report.

Q. And you knew that, didn't you?

A. Yes.

Q. As a technical man, you knew that?

A. Correct.

Q. Do you recognize these boys here? Do you recognize this boy?

A. No.

Q. Don't you remember when you were in that plant that you asked to talk to the engineer in the plant?

A. No, I don't recall any such request.

Q. Don't you remember saying, in substance or effect, "The only way I can sell your product in the Northwest is to sell your plant, therefore I would like to know all about your plant"?

A. No, I don't recall that.

Q. Do you recall that the Rigbys showed you around the plant?

A. We took the customary visitor's tour, yes.

Q. And you saw everything in the plant, didn't you?

A. No, I did not.

Q. Well, let's see how much you did see. You state in this memorandum: "The building is of recent block construction with offices and a retail sales room, main production area used also for dry storage and a newly built zero storage room. The son indicated they had an investment of $300,000."

You certainly saw all of those things which you described, didn't you?

A. I could see that at a glance, yes.

Q. When you say, "The son indicated they had an investment of $300,000"— Would you stand up, Gaylen.

Is this the son that told you that at the time?

A. I can't recall.

Q. Under "Equipment" you state as follows:

"Pies are produced on a straight line Colborne manual pie machine, printed cartons are closed in a Marapak H, [fol. 846] and pies are conveyed to an Amerio plate freezer.

Hot starch method is used with steam kettle for starch which is poured over fruit in tubs. Dough is conventionally mixed."

You certainly covered all of that area, didn't you Mr. Schenk?

A. I could see that in the first five minutes, yes, as anyone could who is experienced.

Q. "Capacity—Limiting factor is the plate freezer which has a capacity of 1400 pies."

Now, you certainly saw that plate freezer?

A. Oh, yes.

Q. Who told you it had a capacity of 1400 pies? Were you told that or did you simply make a judgment on that based on observation?

A. No, they were quite proud to point this out.

Q. And you were quite anxious, I take it, to have it pointed out?

A. I listened, yes.

Q. Didn't you specifically ask them how many pies a day they would turn out?

A. No, I don't believe so.

Q. Then you state:

"Freezing takes 90 minutes which would indicate an average speed of 16 pies per minute."

Now, that freezing time 90 minutes, I take it you secured by asking them about it? You weren't there for 90 minutes, were you, to observe it yourself?

A. No, I wasn't. I asked about the Amerio freezer. This is the first time I had seen one of those in operation.

Q. Then you go on to say: "The pie machine was operating intermittently with frequent stops to wait for the plate to clear. Rigsby indicated they were turning out 10,000 pies per day and running 10 to 12 hours which ties in with the speed of the plates."

Now that figure of 10,000 pies per day, that production figure—

Mr. Lamb: If your Honor please, will my brother move over so I can see the witness. I have never seen anything so rude in the courtroom in my life.

Mr. Alioto: Well, if it is rudeness, I assure you it was unintended, and I'll apologize for it, but I am sure every lawyer in this proceeding thus far has placed himself between you and a witness.

[fol. 847] Mr. Lamb: Not between a witness such as this and myself.

Mr. Alioto: I will stand here so you will get a good view of this witness.

Mr. Lamb: Thank you very much.

Mr. Alioto: Stand right here.

Mr. Lamb: Thank you very much.

By Mr. Alioto:

Q. Now, you go on further to say, Mr. Schenk, that "Rigsby indicated they were turning out 10,000 pies per day." Could you pick out which one of the Rigbys in that row told you that?

A. No, I can't.

Mr. Lamb: I can't see now, your Honor.

Mr. Alioto: Well, I asked you if this place was all right. Would you please designate the place you want me to stand, Mr. Lamb, so there won't be any questions about it? And any more interruptions on the story that you don't want to get to that jury? Would you designate the place, please? So you won't interrupt? Just pick it out for me, will you?

Mr. Lamb: Mr. Alioto, I—

Mr. Alioto: I don't blame you for trying to interrupt this story. I would, too, if I were you.

The Court: All right, all right, gentlemen.

Mr. Alioto: I'll stand here, if it's all right. Can you see everybody now?

Mr. Lamb: If your Honor please, I brought this witness here.

The Court: Well—

Mr. Alioto: All right. Let me go ahead, now, Mr. Lamb.

The Court: Suppose we just examine the witness.

Mr. Lamb: Thank you.

[fol. 848] By Mr. Alioto:

Q. And you go on and state in conclusion: "From a competitive point of view, the Utah Pie Company has the following advantages: Low overhead due to family management; (2) Non-union labor force; (3) Freight advantage into the Inter-mountain markets."

I take it you knew at the time that this was the only pie producing plant in the Utah-Idaho area?

A. I'm not even sure that that's true today. I think there are other pie producing plants in the Utah-Idaho area.

Q. In either Utah or Idaho?

A. Yes.

Q. Where are they?

A. Well, almost every town has an operation of this type where they produce pies.

Q. Are you sure of that, now, Mr. Schenk, or are you just making your statement on it?

A. As far as I know, I think there is a bakery in almost every town. I—

Q. You mean for fresh pies?

A. Yes.

Q. I'm talking about frozen pies.

A. Well, many of the fresh bakeries are also freezing pies.

Q. All right. Okay. After you returned to St. Louis from this visit—approximately when was that?

A. Within the next few weeks.

Q. I take it you had a conversation with Mr. Dittman about this.

A. I can't recall conversing with him about it. I wrote this particular report.

Q. Well, would you deny that you had the conversation with him about it?

A. No, I wouldn't deny it or affirm it.

Q. Can you state whether or not you telephoned any of your superiors in Salt Lake City after you made this visit to pass on the information you had secured?

A. No, I'm sure I did not.

Q. Did you ever speak to Mr. Leutwiler, Mr. Harter, or Mr. Ellis about this matter?

A. No. I just sent in the report.

Q. Do you recall visiting the office of Mr. Alan Young in July 14 of 1959?

A. I could very well have visited his office at that time. I don't remember the date.

Q. I wonder if you could help us with this, Mr. Schenk. Plaintiff's Exhibit 47 in evidence is a memorandum which reads as follows:

[fol. 849] "Discussion with Safeway regarding private label. July 14, 1959."

And your name is written at the top, "B. Schenk." Is that your handwriting?

A. No.

Q. It goes on to say: "The following points were covered and agreed on in a discussion with Safeway in the office of Alan Young between Boyd Schenk and me."

That's an unsigned memorandum, and we've been trying to identify that "me." That is, the writer of that memorandum. Would you be good enough to state who that is? Who was with you in that office at the time of that meeting? Was it Mr. Bittner?

A. No. Mr. Bittner was never in the office with me.

Q. All right. Was it Mr. Dittman, then?

A. It's possible, but I don't—I don't recall.

* * * * * * *

[fol. 850] The Witness: I don't think that this was Mr. Dittman.

By Mr. Alioto:

Q. Who was it?

A. I don't believe there's—there's a point in here where it says, "It would be Schenk's responsibility to develop this contract." And I don't think that Schenk and Dittman both developed a contract simultaneously. It possibly could be —it could have been Mr. W. N. Harsha.

Q. Mr. Harsha?

A. Yes. But I'm not sure.

Q. It wasn't Mr. Gamble, by any chance, was it?

A. No. I've never made a trip like that for him.

Q. But you have made such a trip to the Safeway plant with Mr. Harsha?

A. To the Safeway office, yes.

Q. To the Safeway office. And what was Mr. Harsha's position at the time?

A. Mr. Harsha was general manager of the Pet-Ritz Division in 1959.

Q. That is, general manager of the whole division relating to frozen pies?

A. Yes, up until about—it was in 1959 that I think that the Pet-Ritz Division was absorbed into the milk products division.

Q. Now, Mr. Schenk, there is—

A. I'm a little—

Q. There's a paragraph here that I'd like to read you and then ask you one question about it in view of the fact you were present there. "Detailed discussion—" I'm reading from Plaintiff's Exhibit 47. It starts out by saying: "The following points were covered and agreed on in a discussion with Safeway in the office of Alan Young between Boyd Schenk and me."

Mr. Lamb: Your Honor, I object to this further line of questioning on the grounds it goes beyond the direct examination.

Mr. Alioto: Submit, if your Honor please, that this whole Safeway negotiation is made relevant by this memorandum, in view of what has been said here, in the memorandum on Safeway.

Mr. Lamb: What he's reading from now is something that happened in 1959; and the memorandum is a 1960 memorandum. There is no connection whatsoever between them.

[fol. 851] Mr. Alioto: I submit, if your Honor please, that the negotiations with Safeway are very vital, a very vital part of the—

Mr. Lamb: It was not brought out on direct examination, your Honor, and it goes beyond the scope.

The Court: Overruled.

By Mr. Alioto:

Q. The third point in this meeting reads as follows: "Detailed discussion was had with Young on the need to develop better cooperation between the Safeway Sales Division and the Pet-Ritz Sales force in stocking Pet-Ritz pies. Young agreed to write a letter to each of the Safeway Divisions requesting help in our behalf, reemphasizing the advantages in freight savings by pooling Pet-Ritz with the Bel Air brand. In other words, Young will act as a door opener for our sales people, particularly in the case of the 9-inch fruit, creams, custard, and 8-inch fruit flavors not produced under the Safeway Bel Air label. In addition, Young will encourage the Safeway sales division to stock Pet-Ritz flavors of 8-inch fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz both in quality and in price. Young will send me a blind copy of the letter that goes to each Safeway division, with the understanding our men are not to quote from this letter. Schenk will advise as to the sizes and/or flavors by Safeway sales division on which we need support."

Do you remember that discussion, Mr. Schenk?

A. Yes.

Q. And did you in fact advise the Safeway division on those sizes and flavors on which you needed this kind of support or wanted this kind of support?

A. No, I did not.

Q. Well, why didn't you follow up? I take it you received a copy of this memorandum, didn't you?

A. I don't recall but—I don't recall that particular assignment.

Q. You say you don't recall receiving a copy of this memorandum?

A. I don't recall any such assignment being given to me.

Q. Mr. Schenk, could this language be "Schenk" on this letter, the handwriting? Could it be Schenk on this letter? Is that the handwriting of some secretary who prepared it?

A. I have no idea whose handwriting it is.

Q. Doesn't that writing indicate that you did in fact receive a copy of this memorandum at the time?

A. I certainly should have received a copy.

Q. And if Mr. Harsha is the writer—and he was your superior—would you be good enough to tell us why you [fol. 852] didn't follow through on what appears to be an understanding that "Schenk will advise as to the sizes and/or flavors by Safeway sales divisions on which we need support"?

A. I don't recall any such assignment, and this is a little out of my area, too. It's very unusual for me to be given any such assignment.

Q. Did Mr. Harsha know what area you were operating in?

A. Yes.

Q. In 1959?

A. Right.

Q. He was your superior, wasn't he?

A. Correct. I'm not even sure that this was written by Mr. Harsha, you will recall.

Q. Well, give us all of the people that could have written it, to the best of your memory, if it wasn't written by Mr.—

Mr. Lamb: Your Honor, I object to this. This calls for speculation.

Mr. Alioto: No, it doesn't. Let me ask the question.

By. Mr. Alioto:

Q. You read that again, and give us the best memory you have as to who could have written that except Mr. Harsha, Mr. Gamble, or Mr. Dittman. Give us your best recollection on that.

A. I can start with a list of people that it was not, including Mr. Gamble.

Q. All right. Well, tell us—give us a list of people, then, who could have written that letter, based upon the fact that he was with you, present at that meeting.

Mr. Lamb: Your Honor, I object to this on the grounds that he's badgering the witness, and he's calling for conclusions that the witness doesn't know anything about.

The Court: I don't think he's badgering the witness at all. This is cross-examination. He is trying to find out who the writer of that memorandum is; and one way to do it is to reflect upon the names of the people who he thinks, or about whom he has the—the best recollection he can bring up.

Mr. Lamb: Your Honor, he said he didn't know.

The Court: Well, he didn't say he didn't know. He has named Harsha. Now, go ahead and name anybody else there that you—

[fol. 853] Mr. Lamb: If your Honor please, we have our annual statements in the record here. We've got names of Mr.—

The Court: I know. We also got a witness here. In that document, you know, it says that Schenk is going to do this, he's going to follow up on it.

Mr. Lamb: I recognize that.

The Court: That he'll take over, you know. Now, Mr. Schenk was familiar to this to some extent. Now, let's have the best recollection you have about that, Mr. Schenk. You've said it might have been Harsha. Might it have been Dittman? Might it have been somebody else? I don't know the names of them. That's what Mr. Alioto is asking you about, and I'm going to let him pursue that.

Mr. Lamb: May I make one point, your Honor? Mr. Dittman will be my next witness, and Mr. Harsha will testify on Monday.

The Court: I have both of those gentlemen in mind. We will no doubt be pursuing it with them—somebody will, I'm sure.

Mr. Lamb: They'll be here.

The Court: Yes. All right. Is Mr. Gamble coming, now?

Mr. Lamb: No, Mr. Gamble is overseas, your Honor.

By Mr. Alioto:

Q. Mr. Schenk, let me ask this question as a preliminary, so there will be no question, in view of the fact that the objection has been made. This memorandum states that you were at this meeting?

A. That's correct.

Q. It's a meeting between Mr. Young, you, and a man identified as "me." There were just the three of you. Now, on the basis of that, stating it in that fashion, and using the best recollection you have, tell us who you believe wrote that memorandum.

A. Well, I mentioned before that the only people that I was there with was our fruit procurement manager at one time, Mr. Harsha, and Mr. Dittman. I think this was before Mr. Dittman was handling it, so—

Q. All right. Now then, your fruit procurement manager obviously didn't write that one, did he?

A. I doubt it very much.

Q. That reduces it down, then, to Mr. Harsha or Mr. Dittman.

A. Right.

. . . . . .

[fol. 854] By Mr. Alioto:

Q. Now, this sentence: "Young will encourage the Safeway sales division to stock Pet-Rits flavors of 8-inch fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that

competes with Pet-Ritz both in quality and in price. Now, one of those competing pies was the Utah Pie Company, was it?

Mr. Lamb: I object to this, your Honor, on the grounds that it's repetitious.

Mr. Alioto: I haven't asked that yet.

The Court: Overruled. Now, we're going to have the question again. Do you want to read it back?

Mr. Alioto: Yes. I'll rephrase it.

By Mr. Alioto:

Q. The sentence I'm reading from states as follows, and reports the points discussed at the meetings at which you were present: "In addition, Young will encourage the Safeway sales division to stock Pet-Ritz flavors of 8-inch fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz both in quality and in price."

Now, it's a fact, is it not, that one of those competing pies was the pie of the plaintiff company?

A. I don't know.

Q. Well, don't you remember anything about this meeting you attended, Mr. Schenk?

[fol. 855] A. I certainly don't remember any discussion about the Utah Pie Company, which is what you're inferring here.

Q. Well, do you remember any discussion about getting Young's help in this fashion where you have competing pies of any kind?

A. Yes, correct.

Q. All right. And did you participate in that discussion?

A. Yes, I did.

Q. And this is something that you or the writer suggested to Mr. Young, wasn't it?

A. We pointed out to Mr. Young that those Safeway divisions which purchased both Bel Air and Pet-Ritz pies would have a freight advantage and that there was eco-

nomic justification for this, and tried to persuade him that this was the wisest course for the Safeway Company to follow.

Q. And the purpose was to knock out the competing pies, wasn't it?

A. I would say the purpose was to sell more Pet-Ritz pies.

• • • • • • •

Q. Okay. Now then, it states that: "Young will send me a blind copy of the letter that goes to each Safeway division, with the understanding that our men are not to quote this letter."

Now, tell us everything you remember about this discussion about getting blind copies of letter which were never to be quoted.

A. Mr. Young has no direct authority over the Safeway divisions, and, therefore, it would be a matter of persuading them. And so our salesmen could jeopardize their position with the buyers if they were to go in and attempt to use this as a means of selling. Our salesmen were instructed that they were to sell on the basis of our quality and our price and so on, which gives us obvious advantages over our competition.

[fol. 856] Q. Did you get these blind copies of the letters for Mr. Young?

A. I did not, no.

Q. Did the company get them?

A. Not to my knowledge.

Q. Did Mr. Young receive any consideration from you folks, or from Pet Milk Company, for his undertaking to act as a door opener for you on other pies?

A. Absolutely not.

Q. To your knowledge?

A. To my knowledge.

Q. You mean that you have no knowledge of it?

A. I mean all of the questions that I'm answering are just within my knowledge.

Mr. Lamb: Your Honor, I object to the innuendoes that counsel continues to cast toward the jury—

The Court: I don't think they're innuendoes.

Mr. Lamb: Do you mean that explosion, your Honor, which was held there a little while ago wasn't an innuendo?

The Court: You invited that, Mr. Lamb. Now, let's not have any more interruptions. If you want to make an objection, do it; but let's not have any more conversation about it.

Mr. Lamb: I object to the innuendoes.

The Court: The objection is overruled. I don't think there is any innuendo. I think he has been handling this witness rather gently.

* * * * * * *

Redirect examination.

By Mr. Lamb:

Q. Mr. Schenk, did you prior to your visit to the Utah Pie Company, or after the visit to the Utah Pie Company, ever enter any frozen pie plant on the basis on which you entered the Utah Pie Company?

A. No, I did not.

Q. Is it or is it not a matter of policy of the Pet Milk Company to sanction such visits—visits that had any misrepresentation attached to them?

A. No, it's against company policy.

Mr. Lamb: I have no further questions, but, your Honor, I'd like to make a motion that the testimony of this witness be stricken, on the grounds that it does not prove or disprove any of the issues in this case.

[fol. 857] Mr. Alioto: We'll submit it.

The Court: The motion is denied. We discussed that out of the hearing of the jury at some length.

Mr. Lamb: I want to renew the motion.

The Court: The Court ruled at that time, and I stand by that ruling.

* * * * * * *

DAVID THEODORE DITTMAN, called as a witness on behalf of defendant Pet, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Dittman, will you state your full name, please.
A. David Theodore Dittman.
Q. And your address?
A. 1010 Barberry Lane, Kirkwood, Missouri.
Q. Do you work for the Pet Milk Company?
A. Yes, sir.
Q. What is your position with that company?
A. Administrative Manager, Frozen Food Division.
Q. How long have you been with the Pet Milk Company?
A. Eighteen years.
Q. And what various positions have you held with the company?
A. I started with Pet Milk Company here in Salt Lake City for Sego Milk Products Company. At that time I was traffic and office manager here in Salt Lake City.

I continued in basically that function until January of 1960, when I was appointed contract sales manager for the Pet Milk Company and was transferred to St. Louis.

Q. Mr. Dittman, I show you Plaintiff's Exhibit No. 38 and ask you what that is?
A. It is a letter from Mr. Schenk to me.
Q. Did you receive that letter?
A. Yes, I did.
Q. Are you familiar with its contents?
A. Yes.
Q. Did you at any time transmit any of the contents of that memorandum to any employee of the Safeway Company?
A. No, sir.
[fol. 858] Q. Did you ever use any of the contents of this letter in negotiating the contract for the private label Bel Air pie with the Safeway Company?

A. No, sir.

Q. To your knowledge, does the Safeway Company purchase frozen pies other than the Bel Air brand?

A. Oh, yes.

Q. And what do they purchase?

A. Well, here in this market they purchase Utah brand pies and possibly Morton and Johnston. I think I have seen Stokeley in a Safeway Store here. And nationally, of course, there is Banquet and Morton and Mrs. Smith.

Q. Do you know whether or not it is a matter of policy of the Safeway Stores to permit their divisional purchasing agents to purchase whatever frozen pies they wish?

A. They have complete freedom to purchase any pie they want.

Mr. Lamb: No further questions.

Cross examination.

By Mr. Alioto:

A. That's right. Sego Milk Products Company was a subsidiary.

Q. Now, it is a fact, is it not, Mr. Dittman, that you have been the man principally concerned with the negotiations of the Safeway contract, the contract between the Safeway Company and the Pet Milk Company?

A. Since 1960.

Q. And in 1959 who was the man principally concerned with the negotiation of the Safeway—Pet Milk contract?

A. Mr. Schenk and Mr. Harsha.

Q. Mr. Schenk and Mr. Harsha.

A. Right.

Q. Now, your Safeway contract—referring to the questions last asked you by your counsel—your Safeway contract is an exclusive dealing contract on the Bel Air—

Mr. Lamb: I object, your Honor. This is a conclusion of law on the part of counsel, and the question should not be put to this witness.

Mr. Alioto: I will reframe the question, but I am going to say the same thing in different words, I will tell you that now.

[fol. 859] By Mr. Alioto:

Q. It is a fact, is it not, that your Safeway contract, both in its negotiations and in its execution, is a contract under which Safeway buys its fruit pies under the Bel Air label only from your company?

A. No.

Q. All right. Tell us the name of the other—tell us the name of any other manufacturer which delivers apple pies to Safeway under the Bel Air label.

A. I can tell you the name of a company that delivered pumpkin and mince, but not apple.

Q. I am not talking about—I said fruit pies. Did you include mince and pumpkin as fruit pies?

A. I was including the Bel Air label, everything that is sold in the name of Bel Air.

Q. When I asked you the question a moment ago, did you include *fruit* and pumpkin? Do you regard those as fruit pies?

A. Yes.

Q. Let's exclude those, so that we can have this very clear. It is a fact, is it not, that both in connection with your negotiations and the actual Safeway contract, the arrangement calls for all of the Bel Air pies, the fruit frozen pies, as distinguished from pumpkin and mince, to be manufactured by your company for all of the Safeway Stores throughout the United States?

A. No.

Mr. Lamb: I object to the question. It calls for a conclusion which is unwarranted.

A. It is not even true.

Mr. Alioto: He said "no."

By Mr. Alioto:

Q. You say that is not so?

A. That is not so.

Q. Name us one other manufacturer who manufactures apple pie for Safeway under the Bel Air label.

A. I don't know one, but that makes no difference. They are free to negotiate with anybody whom they want to and buy from whomever they wish to.

Q. Let me put it this way: Will you agree with me that no other manufacturer has manufactured apple pie for Safeway under the Bel Air label for any of its stores throughout the entire United States in the period of time from December, 1958 down to the filing of this complaint in September of 1961?

A. I don't know that.

Q. Can you name one who has?

A. No, but I don't know who they buy from.

[fol. 860] Q. Then you are telling me that in your capacity, in the present capacity, with the Pet Company, and as a negotiator of the Safeway contract, that you do not know the name of a single manufacturer who manufactures apple pie for Safeway under the Bel Air label in any Safeway Store throughout the United States, is that it?

A. I know the names of companies who are quoting Safeway on that business.

Q. I am not asking you that. We will get to that in a moment if you would like to get to that, or anything you want to say you may say, but for the moment, is my statement correct that you do not—you cannot name for us one single manufacturer in the entire United States who has manufactured an apple pie for Safeway under the Bel Air label in any Safeway Store in the United States?

A. I don't know, no, but I don't have their sales records. How could I know?

Q. In addition to the fact that you don't know of one, Mr. Dittman, you actually know, don't you, that there isn't one?

A. No, I don't.

Q. You don't know that?

Mr. Lamb: Your Honor, I object to the insinuations.

The Court: Overruled.

By Mr. Alioto:

Q. If there was another apple pie manufacturer, or any manufacturer who manufactured even one apple pie for Safeway under the Bel Air label in any of its stores throughout the United States, in the very nature of your business you would know that, wouldn't you?

A. No, I would not know that.

Q. Let me show you a memorandum marked 47, Plaintiff's Exhibit 47 for identification—in evidence, rather, Mr. Dittman. That purports to be a memorandum from your company of a discussion with Safeway regarding private label July 14, 1959 and purports to set forth the points covered and agreed on in a discussion with Safeway in the office of Alan Young between Boyd Schenk "and me."

Would you be good enough to say whether you are the writer of that memorandum?

A. I am not.

Q. Who is?

A. I don't know.

Q. In July of 1959—I think we had some testimony this morning that this memorandum was either written by you or Mr. Harsha. Can you tell us whether or not on July 14 of 1959 Mr. Harsha was the principal negotiator for the company in connection with the private label packing for Safeway?

[fol. 861] A. I don't know that for a surety. I started on this contract in January, 1960, and anything that went on before that time would be just hearsay, and I can't comment on it.

. . . . . .

Q. I'll ask it again. After you assumed the position that you did in connection with the Safeway contract in January of 1960, I take it that you had available to you all of the company records with respect to that negotiation, recording the events which took place prior to the time you got there?

A. They would have been available, yes.

Q. And did you read those?

A. No.

Q. To acquaint yourself with the history of these negotiations?

A. I started out with the contract that was in effect at the time, and gradually worked into it. I didn't effectively get into it until maybe March or April.

Q. Then, I take it that so far as you're concerned, from January of 1960, on, that you never reviewed the actual events relating to the Safeway contract that may have taken place prior to January of '60?

[fol. 862] A. I have referred to letters and correspondence back in there, but I never went through it word for word or letter for letter to get familiar with everything that happened from '58 on. In fact, if a particular subject came up or was necessary, I'd hunt for the file; but that's the only way I have—really the only reason I have an occasion to.

Q. Did you know in January of 1960 that the Safeway Company regarded the Utah Pie Company of Salt Lake City as the first processer capable or producing for Safeway in addition to Pet Milk Company?

A. What was the question?

Mr. Alioto: Do you want to read it to him, please?

(Question read.)

A. No.

By Mr. Alioto:

Q. Did you know that at any time prior to your coming to this stand?

A. To this what?

Q. Did you know that at any time before you got on the stand this afternoon?

A. I read in this letter here that Mr. Schenk considered that to be true.

Q. Now, I take it you received this letter—and this letter refers to Plaintiff's Exhibit 38 in evidence—I take it you received this letter, Mr. Dittman, on or about the date it bears, which is July 19 of 1960?

A. That sounds logical.

. . . . . .

[fol. 863] Mr. Alioto: That's correct. It's dated July 19. And I was simply asking him whether he received that letter on or about the date it bears.

The Witness: There's no problem. I said I received it.

By Mr. Alioto:

Q. You did. All right. And I take it at the time you received it you read it, Mr. Dittman?

A. That's right.

Q. And you considered its contents?

A. That's right.

Q. And did you have a discussion with Mr. Schenk about it?

A. No.

Q. Did you have a discussion with Mr. Schenk about it either before or after you received the letter?

A. No.

Q. Did you have a discussion with Mr. Schenk about his visit to the Utah Pie Company either before or after you received the letter?

A. I can't remember.

Q. Then you might have had a discussion with Mr. Schenk?

A. I would have a discussion with Mr. Schenk, because he was the production manager of the Pet Milk Frozen

Food Division, and I was the contract sales manager. Mr. Schenk was responsible for costs, and when Utah Pie was quoting and demoralizing the market with their low prices, I wondered why they could sell for less than we, and was something wrong with our production methods.

Q. So what did you do? Did you ask Mr. Schenk to sneak into their plant to find out?

A. I did not. I just asked him concerning production methods. I said, "What do they have that we don't have?" And I made no comment about sneaking into any plant.

Q. Well, then, you asked him, you asked Mr. Schenk about, "What does Utah have that we don't have?" before he made his visit out here?

A. "Why could they undersell us in this market?"

Q. I'm trying to fix a time, Mr. *Smith*. And then you can say anything you want. It was before Mr. Schenk wrote this letter that you asked him to find out why it was that Utah Pie could undersell you in this market?

A. That's right.

Q. Is that it?

A. That's right.

Q. And did you tell him how he should go about finding this out?

A. Absolutely not.

[fol. 864] Q. You simply left it to him to use any means in his power to find this out?

A. That's right.

Q. And did he come back and give you the answer as to how he found this out?

A. No, he wrote me that letter.

Q. When you received this letter, did you inquire of him how it was that he got into the plant?

A. No.

Q. I take it you didn't care how he got in?

A. I think that's a—you're surmising something. I didn't even think about how it would be necessary to get into the plant.

Q. Now then, this letter also went to a Mr. Leutweiler, Mr. Ellis, and Mr. Harter, who have already been identified. Did you ever discuss this letter with any of those gentlemen?

A. Absolutely not.

Q. Did you ever discuss it with Mr. Schenk himself?

A. No.

Q. At any time right up to the present time?

A. No.

Q. Didn't you discuss this letter with Mr. Schenk in St. Louis within the last month?

A. Oh, we've talked about it in the last month. In fact, we've talked about it today. But I thought you were referring to the period 1960—not immediately—

Q. I was first. You were correct in that assumption. But in the last month you have discussed it with him?

A. That's right.

Q. In your discussion with him in the last month, was there anything said about the fact that you knew about this thing, and how he got into this plant—

A. No.

Q. —back in 1960?

A. In the last month there may have been, yes. But that would be news to me. Actually, it was news to me.

Q. Now then, so far as the letter itself is concerned, Mr. Dittman, I take it at the time that you wrote it, you read that portion of it and understood that portion of it which said: "As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young. Some of these are quite easily remedied, and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves." Then follows: "The points you might use are." And follow a list of disparaging statements.

Mr. Lamb: I object to the use of the word "disparaging."

Mr. Alioto: All right. I'll read what they are again.

Mr. Lamb: It's up to the jury to conclude whether they are or not.

[fol. 865] By Mr. Alioto:

Q. At the time you read that letter, did you *understood* that you were to use complimentary points of the Utah Pie Company in your negotiations with Safeway, or do you understand that language to mean that these are the points you were to use in your negotiations with Safeway for the purpose of disparaging the Utah Pie Company?

Mr. Lamb: I object to the word "disparaging."

By Mr. Alioto:

Q. Which is it?

A. I never used any of those points.

* * * * * * *

By Mr. Alioto:

Q. Now listen to the question, Mr. Dittman, at the time you read this letter, did you understand that the points listed from one to eight at the end of the letter, to be used by you, as the language states, did you understand that they were to be used for the purpose of building up—

A. No.

Q. —the Utah Pie Company or did you understand that they were to be used for the purpose of tearing down the Utah Pie Company? Which was it?

A. I didn't understand either one. That's right. I filed the letter and forgot about it.

* * * * * * *

By Mr. Alioto:

Q. When he states, "The points you might use are," would you be good enough to tell the Court and the jury [fol. 866] the meaning of the word "use"? That is, use it for what? For what purpose?

A. I didn't use this letter. That's the point.

Q. I didn't ask you that. When you read the letter, what did you understand that the "use" refers to? Use for

what? I mean use for a paper drive, use for scratch paper, or did it mean "use" in negotiating the Safeway contract? Which one of those did it mean?

A. Well, we already had a Safeway contract. So—I don't see the point of your question.

Q. Then is it your statement to this Court and to this jury that that does not mean "use" in connection with the Safeway contract?

A. I never used it in connection with the Safeway—

Q. I didn't ask you that. Are you telling this Court and jury on your oath that that language does not mean "use" in connection with the Safeway negotiations? Is that what you're telling us?

Mr. Lamb: I object on the grounds it's repetitious, your Honor.

The Court: Overruled.

The Witness: Mr. Schenk wasn't my superior here. He couldn't order me to do things like this. I don't know what Mr. Schenk intended me to do on this, because I never used the letter, and it's difficult for me to put thoughts in Mr. Schenk's mind.

By Mr. Alioto:

Q. I'm asking you about what you understood the language meant when you received it.

A. Frankly, I never thought about it. I filed the letter.

Q. Is it your testimony to us now—see if we can't get this question answered—

A. All right.

Q. —that the language, "These are the points you might use—"

A. Yes.

Q. Is it your testimony that that does not obviously mean, "These are the points you might use with Safeway"?

A. That is probably what Mr. Schenk meant, but that has nothing to do with what I did.

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[fol. 867] Q. You understood him to mean when you read the letter, quite aside from what he meant, you understood him to mean, "These are the points you can use with Safeway"?

A. Not necessarily. This would be negative selling. You sell on a positive basis. You would never even—in fact, I would never even think of mentioning a competitor in a detrimental way.

Q. You wouldn't think about running down a competitor when you are negotiating a contract, Mr. Dittman?

A. No, I wouldn't, because it would backfire.

Q. Then I take it from what you have said that at no time in your negotiations with the Safeway people have you made a remark which was intended to downgrade the Utah Pie Company.

A. Never.

Q. What made Mr. Schenk, your associate, think that you might want to use that?

A. I don't know what he thought or why he thought it.

Q. How many times did you see the Safeway Company after June of 1960?

A. I can't honestly answer that. Two to four times per year. I presume you mean Alan Young.

Q. Yes. And you generally saw him, did you not, in his office in California?

A. That's correct.

Q. Now, how soon after June of 1960 did you go out to California to see Mr. Young?

A. I don't know.

Q. Well, was it a year later?

A. Oh, no. It would be within three or four months.

Q. You probably saw him twice, didn't you, between June and the end of the year?

A. The letter is dated July 20, I believe, you said.

Q. July 19 is the date of the letter.

A. Yes. Then I probably went—what was your question, sir?

Q. When did you go to see Mr. Young after July 19, as best you can remember?

A. I can't remember.

Q. Would it have been about thirty days later.

A. Well, it could be, but I don't know. It could—possibly I saw him once or twice after July 19. I don't know that for sure.

Q. Once or twice between July 19 and the end of the year?

A. That's a possibility. I just didn't—I can't tell that offhand. I mean, I can check back.

Q. What's your best memory?

A. Well, it's difficult. I have absolutely no—

Mr. Alioto: We have no further questions.

[fol. 868] Redirect examination.

By Mr. Lamb:

Q. Mr. Dittman, does any other frozen pie manufacturer try to compete for the Safeway business which the Pet Milk Company presently has?

A. Yes, sir.

Q. Name some of them.

A. Johnston, Morton, Simple Simon, and I think Banquet.

Q. Utah?

A. And Utah, of course.

Q. Would you tell the Court and jury why Pet Milk Company has the Safeway business?

A. I think we have a good quality program, which Safeway insists on. They have inspectors in our plant almost routinely. We have a price that we can cost-justify, which is another item that Safeway insists on. And all in all, I think that Safeway has confidence in our ability to furnish them with a quality pie, which they want for their Bel Air product.

Q. Does it have anything to do with the fact that Pet Milk Company has three plants?

A. That also does have a bearing on it, in that they do have a division back in Washington, D. C. and we can

supply them out of our Chambersburg, Pennsylvania. And, of course, Fresno, we supply the west here. And then we supply the Midwest out of our Frankfort plant.

Mr. Lamb: No further questions.

Recross examination.

By Mr. Alioto:

Q. Just one last one about this series of questions. I take it you have some considerable respect for Mr. Schenk's business judgment in relation to production facilities?

A. That's correct.

Q. Do you know of any facts to contradict his statement about "I can see why the Utah Pie Company is the first processer Safeway feels capable of producing for him in addition to ourselves"?

A. Nothing other than what you have read in the letter.

Q. And you know of no facts that would lead you to contradict that business judgment of Mr. Schenk?

A. No. Nothing, just in the letter.

Darrell J. Nord, called as a witness on behalf of the defendant Pet, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Nord, will you state your full name?

[fol. 869] A. Darrell James Nord.

Q. Where is your residence?

A. I live at 50 Sonora Way, Corte Madera, California.

Q. Your office address?

A. The same.

Q. Are you presently employed by the Pet Milk Company?

A. No, I am not.

Q. Were you at any time employed by the Pet Milk Company?

A. I was employed by the Pet Milk Company from July 26 until last year—

Q. July 26, what year?

A. 1954.

Q. 1954.

A. Until March 1 of last year.

Q. Where are you presently employed?

A. I am presently employed by the Lyman Sales Corporation.

Q. Is there any connection between that corporation and the Pet Milk Company?

A. No, there is no connection.

Q. Are you here at the request of the Pet Milk Company?

A. Yes, I am.

Q. Did you come voluntarily?

A. Yes, I did.

Q. Was any force placed on you to come here?

A. There was no force.

Q. Did any representative of the plaintiff call you and ask you whether or not you were a disgruntled employee of the Pet Milk Company last Friday?

A. I don't know if it was Friday, but, yes, they did.

Q. Who was it?

A. Mr. Hughes.

. . . . . .

[fol. 870] The Court: Received.

(Defendant's Exhibit A-31 was thereupon marked for identification and received in evidence.)

By Mr. Lamb:

Q. Mr. Nord, I show you Defendant Pet's Exhibit A-31 in evidence and ask you to tell me what that is.

A. This is an ad saying—announcing the grand opening of the Utah Pie Company.

Q. What date is this?

A. This is dated September 13, 1958.

Mr. Lamb: I would like to show this to the jury. This is an ad that was in the Salt Lake Tribune announcing the grand opening of the new plant of the Utah Pie Company. Down here you will see it says, "The public is invited to come in and see the plant."

By Mr. Lamb:

Q. Now, Mr. Nord, were you an employee of the Pet Milk Company at the time this was in the paper?

A. I was.

Q. Did you accept the invitation?

A. I accepted.

Q. Did you go to the Utah Pie Company?

A. We did.

Q. Now, as I understand it, Mr. Nord, you were in a supervisory capacity in 1958 in the sale of frozen pies?

A. That's right.

Q. Who were your chief competitors in this market at the time that you held that position?

A. Our chief competitors were Utah Pie Company and Simple Simon.

Q. Were there any other companies that were your competitors?

A. There were many other companies periodically that would come on an in-and-out basis, yes.

Q. What frozen pie was the Pet Milk Company attempting to sell in this area at that time?

A. We were selling Pet-Ritz brand.

Q. And I take it that is a 24-ounce pie?

A. That is a 24-ounce pie.

Q. Now, Mr. Nord, what were your duties here as the supervisor?

A. Well, I was responsible for directing Pet's marketing program and supervising their personnel.

Q. Whom did you report to?

about what is the core of the case or what is the periphery of the case. It is that simple fact.

The Court: I would think, Mr. Lamb, that invoices are the best evidence of prices.

Mr. Lamb: Your Honor, but it was part of his duty—

The Court: I know, but all he can do is give you some generalized information. You have the specific information in the books and records of the company, and they are in evidence already.

[fol. 872] Mr. Lamb: But, your Honor, there has been a contest here over what the actual invoice prices were as against the offering prices, and I think that this witness is peculiarly qualified, having been in a capacity where it was his job to know what this competitive situation was here, to report that to his company, and I think that, relative to the charge here that we were selling at lower prices in this area, it is material to know whether or not we were selling lower than the plantiff in this case.

Mr. Alioto: This is the point I am making, if your Honor please. They not only have had our invoices, they have had all of our financial records, and the records are here in court now. The question seeks to elicit from this witness what prices were charged by Utah and what prices were paid by Utah customers, and I submit he is incompetent to testify on that, obviously incompetent to testify on that subject matter.

Mr. Lamb: If your Honor please, this witness called on the trade and he tried to sell Pet-Ritz pies.

Mr. Alioto: Just a minute. I don't think we should have an argument on the thing. They are going to prove now the Utah prices from the hearsay of the trade, and it is obvious that our point is correct.

The Court: Objection sustained.

By Mr. Lamb:

Q. Mr. Nord, I show you Plaintiff's Exhibit No. 36 and ask you what that is?

A. This is a segment of one of my management letters, or one of the management letters that were written.

Q. Do you know of your own personal knowledge why there is just part of it shown on this page?

A. Well, this was the section of the over-all management letter that pertained to frozen pies.

Q. What else was in the management letter?

A. Possibly some discussion on evaporated milk activity, nonfat dry milk activity.

Mr. Lamb: Ladies and gentlemen of the jury, I hate to burden you with this, but this letter has been read before and I must read it again, because this witness, I believe, is in a capacity to answer what is wrong.

The Court: I can't hear you.

[fol. 873] Mr. Lamb: I believe this witness can explain to the Court and to the jury the meaning of the last sentence in this, which has been read by Mr. Alioto to the jury.

This is dated December 17, 1958. "St. Louis Sales, I. P. Grill, Management Report, November, S. P. Harter, St. Louis, three copies. Competitive Activity, Frozen Pies.

"Price pies are our most important competition, particularly in Utah, Idaho, and Colorado areas. Utah Pie is by far our principal competitor in Utah and Idaho and the No. 1 selling pie, with frequent featurings of 39 cents to 3 for a dollar.

"This same picture is true of Libby's pies in Colorado.

"Since our recent success distributionwise in the Spokane area, price pies at the present are no longer an important factor. Montana also seems to have gotten away from the featuring of price pies."

By Mr. Lamb:

Q. Now, Mr. Nord, I ask you, what is a "price pie"?

A. A price pie is one that was sold cheaper than the Pet-Ritz label, then we were selling Pet-Ritz.

Q. Was the Utah Pie one of those?

A. It was.

Q. And what others?

A. On occasions Simple Simon may have been, Frigid Dough, Libby, Pictsweet, Bradley.

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[fol. 874] By Mr. Lamb:

Q. Mr. Nord, did you have anything to do with the Spokane market at this time?

A. I was directly responsible for it.

Q. Who is Mr. I. P. Grill?

A. He was my boss.

Q. Mr. Grill was your boss. Did you have any direct connection with the promotions of Pet-Ritz pie in the Spokane area?

A. Directly.

Q. What is meant in the language of the trade when you say "price pies—" when it is said that "price pies at the present are no longer an important factor"?

A. That is meant that the Pet-Ritz label received distribution in the major chains in Spokane, replacing the price pie distribution.

Q. How could you accomplish such a result as a salesman?

A. We did it in three ways: No. 1, we felt we had a premium pie that was superior to the pie that was—pies that were being marketed in the area. And in order to illustrate that—and this is a very common practice with buyers—we had pie cuttings where we would compare the amount of filler, the amount of starch, the type of fruit used, the tenderness of the crust, the packaging. We made these comparisons simultaneously practically to all the buyers in the marketing areas. We delivered to their homes that evening samples so their wives could bake the pies for them. And within a short period of time we announced a Red Skelton 50 cent-consumer offer wherein, if the consumer would mail in the package label, she would be sent 50 cents back in return for trying the product.

These three things tied in together were successful in accomplishing the objective of getting distribution in Spokane and replacing the price pies.

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[fol. 875] By Mr. Lamb:

Q. During your tenure here in a sales capacity, were there various new pies that came into the market and left the market?

A. Yes, there were new pies that came in and left the market.

Q. Will you describe for the Court and the jury—give the Court and the jury a specific example of the introduction of a new pie, different one, into this market.

A. Blue Star would be an example. They were introduced in this market through the IGA Wholesale Grocery house.

Q. How would they get into the market?

A. I don't know exactly how they would get in. In most instances—

The Court: If you don't know, don't pursue it.

A. (Continuing) Price was one of the big reasons they would get in.

Mr. Alioto: I make a motion to strike that, if your Honor please. He just said he doesn't know.

The Court: Stricken.

The Witness: I meant to say I don't know all the factors that were involved in getting distribution. That is what I intended to say, Judge.

By Mr. Lamb:

Q. Will you repeat it again so the jury can hear you. What is your answer?

A. State the question again, please.

Q. How do frozen pie manufacturers come into this market and introduce and get business?

A. I don't know all of the facets involved, but price was one of the most important.

* * * * * * *

[fol. 876] The Court: The objection to it is sustained and the witness' answer, which he gave before counsel had an opportunity to object, is stricken from the record, and you ladies and gentlemen are instructed wholly to disregard it.

By Mr. Lamb:

Q. Mr. Nord, will you tell us whether or not the Pet-Ritz pie is competitive with the Utah pie?

A. Pricewise or qualitywise?

Q. Both ways.

A. It is competitive qualitywise, but it is not competitive pricewise.

Q. Has it ever been competitive pricewise with the Utah Pie Company during the time you were here?

A. They were always cheaper.

Q. What pies do you regard as quality pies that were sold in this market at the time you were here?

A. I regarded Utah pie as quality pie, and I regarded Simple Simon as a quality pie, Morton.

Q. Will you tell us whether or not the 22-ounce pie is competitive with the 24-ounce pie?

A. Pricewise, competitive?

Q. Yes.

A. No. It is cheaper.

Q. And what about the 20-ounce pie?

A. That is cheaper.

Q. During your tenure as sales manager, tell us what happened to the Pet-Ritz pie?

A. The Pet-Ritz label deteriorated in sales. Our sales went down.

Q. Would you give the Court and the jury the reason for the deterioration of those sales?

A. The deterioration was because of price pies in the market that were cutting the price. We couldn't continue to sell at our price.

Q. Did you ever make an attempt to meet those prices?

A. I made an attempt.

Q. Tell the Court and the jury what you tried to do.

A. I would submit recommendations to my superiors advocating that we meet the prices of the various brands in the market in order to retain our distribution.

Q. And what happened?

A. I was not given permission to authorize meeting these.

Q. What eventually happened as far as the Pet Milk Company is concerned with regard to meeting this competition? What did they specifically do?

A. Recognizing that there was a tremendous market for price pies, they introduced a price pie.

Q. What pie was that?

A. That was under the Swiss Miss label.

Q. And what was the size of it?

[fol. 877] A. That was a 20-ounce 8-inch pie.

Q. Can you tell us whether or not it sold at the price of the 24-ounce pies?

A. It was cheaper generally.

Q. When was the Swiss Miss pie introduced into the Salt Lake market?

A. August of 1960.

Q. Is there any difference between the Swiss Miss pie and the Utah pie?

A. There is four ounces of weight, for one thing, yes.

Q. Is there any difference in price between the two of them?

A. There is a difference in price. Swiss Miss is generally a cheaper pie.

Q. And after the introduction of Swiss Miss pie, what happened in this market, as far as the Pet Milk Company is concerned?

A. We obtained distribution with the major chains in the area on the Swiss Miss label.

Q. Could you tell me what a private label pie is?

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Mr. Alioto: It seems to me we have gone all over this evidence at least a thousand times in this record.

The Court: I have been wondering why you want to prove a thing a half dozen times, Mr. Lamb. This has all been gone into, every bit of it.

Mr. Lamb: Your Honor, that is one of the definite difficulties when you have three defendants, when you have a conspiracy case and you have a separate case.

The Court: Well, you know that has been proved here. It is in evidence. These private label pies we have discussed for two weeks.

Mr. Lamb: I am trying not to be—

The Court: I know them off by heart myself now.

[fol. 878] Mr. Lamb: I will not pursue this line of questioning any further, because I do not intend either to prolong this discussion, but I did want to show the introduction of the Swiss Miss, when it happened, and so forth, your Honor, and what effect it had on the market. And I think that is sufficient as of now and I will not question any further along that line.

By Mr. Lamb:

Q. Mr. Nord, I show you Plaintiff's Exhibit No. 49 in evidence and ask you to tell me what that is.

A. This is a letter that I wrote to my superior, A. N. Coleman.

Mr. Lamb: Ladies and gentlemen of the jury, this letter is dated February 11, 1960, to A. N. Coleman by D. J. Nord, saying, "Personal."

"I know I sounded quite disappointed when you told me we weren't going to meet Simple Simon's deal all the way in Utah. I can assure you that this feeling will not be passed on to Bennion or any of our men when it is handled with them, and we will do everything within our power, using the techniques you suggested and some of our own,

to retain our position in the market. I have already talked with Bennion on this, and he has accepted it; and, after our talk, he is even enthusiastic and feels we are doing the right thing.

"We will keep you posted as to what the situation is in the Utah market.

"If you want to know the truth, we are darn glad to have the deal we have in Montana and Idaho. I have got my lip off the floor again now, and we are cooking for gas.

"See you next week."

By Mr. Lamb:

Q. Who was Bennion?

A. Bennion was my area manager supervising the Salt Lake market.

Q. How come you had your lip on the floor? What does that mean?

A. I was feeling rather bad at the time.

Q. Feeling bad about what?

A. About not being given this deal to meet the other competitive pie.

[fol. 879] Q. What deal is that?

A. The deal that Simple Simon had in the market at that time.

Q. Do you recall what it was?

A. I don't.

Q. Do you know whether it was lower than your prices?

A. It was lower than our prices, yes.

Q. Is it a fact that you asked permission to meet it?

A. That's right.

Q. And that was not granted?

A. That was not granted.

Q. Why didn't you want to transmit that on to Bennion?

A. To a salesman it would be detrimental. He would lose his enthusiasm and interest in trying to sell our pie. We approached it from the standpoint of going out and—a hard-sell type of technique, comparing quality and—

Cross examination.

By Mr. Alioto:

Q. Mr. Nord, just a few questions. You were asked about a letter that you wrote to Mr. Coleman.

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[fol. 883] By Mr. Alioto:

Q. Mr. Nord, this letter is very hard to read, this copy in evidence, but you can see it is a letter written by you to a Mr. Coleman on February 11, 1960. Would you be good enough to identify Mr. Coleman, please.

A. Mr. Coleman at that time was my immediate superior, the region sales manager.

Q. And where was Mr. Coleman's office?

A. Mr. Coleman was located in San Francisco.

Q. Now, what happened at that time, Mr. Nord, is it not, is that you asked for permission to meet a Carnation deal, a Simple Simon deal; that's correct, is it not?

A. That's right.

Q. And Mr. Coleman told you not to meet the Carnation deal?

A. That's right.

Q. Did you ask him why?

A. Yes, I asked him why.

Q. Did Mr. Coleman also tell you that you were not to communicate what he told you to your salesmen?

A. No, he didn't tell me that.

Q. Who was Mr. Bennion?

A. Mr. Bennion was my area manager.

Q. For what area?

A. For the Salt Lake marketing area.

Q. Covering what territory?

A. Covering Utah and southern Idaho.

Q. Was he your superior?

A. Bennion?

Q. Yes.

A. No, he worked for me.

Q. So he was your salesman, was he, for the area?

A. Yes, sir.

Q. And he contacted the trade?

A. Yes, sir.

Q. And your superior in San Francisco, I take it, was responsible to the head office in St. Louis?

A. That's right, sir.

Q. And your superior in San Francisco told you not to meet the Carnation competition and not to tell your salesmen that you were told that, didn't he? Isn't that what he told you?

[fol. 884] A. No, he didn't tell me not to tell my salesmen.

Q. He told you not to tell Mr. Bennion then?

A. No. He didn't say anything about that. I merely—this was my own volition in that I wanted him to know I was not passing on or demoralizing the sales force because we hadn't met a particular pie deal in the market.

Q. Well, let me read this the best I can.

"I know I sounded quite disappointed when you told me we weren't going to meet Simple Simon's deal all the way in Utah. I can assure you that this feeling will not be passed on to Bennion or any of our men when it is handled with them, and we will do everything within our power, using techniques you suggested and some of our own, to retain our position in the market."

Mr. Alioto: Thank you. Mr. Lamb, would you have any objection to our attaching this very legible copy to the original?

Mr. Lamb: Not at all.

Mr. Alioto: I ask that the clerk, if your Honor please, with Mr. Lamb's permission, attach the legible copy to the exhibit which is in evidence.

By Mr. Alioto:

Q. Now, Mr. Nord, I have just read a portion of a document to you. Why did you mark that document "Personal"?

A. I really don't know.

Q. Now, shortly after this time you announced to Mr. Coleman, didn't you, that Carnation not only was giving this price reduction which you weren't going to meet in Idaho, but they had extended it down to Utah; do you recall that?

A. Yes, sir, I do.

Q. And he still told you you couldn't meet that, didn't he?

A. That's right, sir.

Q. Do you recall, Mr. Nord, that there came a time in approximately June of 1961 when you secured some kind of an arrangement from your superiors to drop your price in Salt Lake City by approximately 40 cents?

A. I remember the incident, yes.

Q. And who was the superior you asked to give you that?

A. That was Mr. Buell.

Q. And this happened in or about June of 1961?

A. In that area, yes, sir.

Q. Now, it is a fact, is it not, Mr. Nord, that you didn't drop your price at that time in June of 1961 by 40 cents in this area alone for the purpose of meeting the Utah Pie Company competition, isn't it?

A. Would you mind repeating the question.

[fol. 885] Q. I asked you whether or not it was a fact—or put it another way: It is a fact, is it not, that you didn't make that price drop, or that price cut, in the Salt Lake Division and in this area, in or about June of 1961, for the purpose of meeting the plaintiff's competition, namely, the Utah Pie Company?

A. That's right, it was not to meet the plaintiff.

Q. It was done for the purpose of meeting that 2.85 price and 2.55 f.o.b. Watsonville price of the Morton Company, wasn't it?

A. That's right.

Q. And did you make any inquiry at that time to determine whether or not that low price cut of the Morton Company was an illegal price cut?

Mr. Schafer: I object, your Honor.

Mr. Lamb: I object.

Mr. Schafer: There is no foundation for that question.

Mr. Alioto: There is a lot of foundation in the law for that question.

Mr. Schafer: Now he is arguing to the jury, your Honor.

The Court: I think that is calling for a legal conclusion.

Mr. Alioto: Let me put the question another way. Let me put it another way.

By Mr. Alioto:

Q. Now, this was about the lowest price you hit in this market, wasn't it?

A. I believe that was very near the lowest.

Q. And it was the price that you made available to the Safeway Company, wasn't it?

A. We made available to the marketing area.

Q. Did you sell to anybody but the Safeway Company at the time you made that price cut?

A. We were selling to other customers in the area, yes, sir.

Q. Is my impression wrong that you only made those sales to the Safeway Company at that time?

A. No, sir. This was on, Mr. Alioto, the Swiss Miss label, I would like to clarify that, and we were selling it to other customers in the marketing area at that time, and this offer

was made available to all of them, and it was so published by my letter.

Q. Well, did anybody buy except Safeway, let me put it that way?

[fol. 886] A. Actually no one—this was an advertising allowance, and in order to qualify for this reimbursement, they had to advertise, and no one advertised.

* * * * * * *

[fol. 887] Q. You just went down to that price because Morton did; is that it?

A. No. We went down—if I can elaborate just a little—

Q. Surely. Say anything you want, Mr. Nord.

A. We went down to that price. We had distribution on our product in the marketing area. And when a price pie comes in at $2.85 price, or 40 cents a case less than us, the customers that were stocking our product, in order to be competitive with their competition, felt they had to buy the cheaper pie. This is perfectly understandable. But it's also a rather involved process for them to completely disrupt their distribution and pull out the cases of pies they were buying and put in the others. So we were told that these prices existed, and could we do anything about it. I checked with other jobbers in the area to substantiate these statements. Subsequently I had been informed through marketing channels that Utah Pie Company had met Morton's activity. There didn't seem to me to be any other choice except to make a strong recommendation that we meet this in order to retain our distribution in the market area.

Q. But your recommendation was that you meet the activity initiated by Morton?

[fol. 888] A. Initially, and followed by Utah.

Q. That's correct.

A. Yes.

Q. Okay. Now, one last question, Mr. Nord. There is in evidence in this case an Exhibit 20, Plaintiff's Exhibit 20,

which is dated January 13, 1959, from you to Mr. Bittner. Just take a fast look at that. It's very short.

A. Yes, sir.

Q. Now, you recall that this sets out a so-called pumpkin and mince group tie-up report for 1958 in the Salt Lake Division?

A. That's right.

Q. What is a "tie-up report"?

A. A tie-up report is a report telling which major advertising accounts in the area support us for giving an ad on these particular items.

Q. And the attached page shows Salt Lake Division and lists a number of towns, a number of cities and towns, Salt Lake City, Pocatello, Twin Falls, Great Falls, Helena, Boise, Billings, Spokane, Kennewick, Pueblo, Grand Junction, Longmont, and Denver. And then it lists a number of stores in that group. Did you prepare that listing with the number of stores?

A. Yes, I prepared this list here.

Q. And that list accurately sets forth the number of stores in this trading area, in this Salt Lake Division?

A. This would indicate the number of stores that were in that particular group at that particular time, and this is fluctuating.

Q. Okay. And did your Salt Lake Division have jurisdiction over all of the area set out in that list?

A. Yes, sir.

Mr. Alioto: We have no further questions of this witness, if your Honor please.

Redirect examination.

By Mr. Lamb:

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[fol. 889] By Mr. Lamb:

Q. Mr. Nord, I show you Plaintiff's Exhibit 20, which Mr. Alioto just recently questioned you on, and I ask you

whether or not this is all one marketing area, or is it a number of marketing areas?

A. This is a number of marketing areas.

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GEORGE D. WOHLHUETER recalled as a witness on behalf of the defendant Pet, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Wohlhueter, I show you Defendant Pet's Exhibit for identification A-40, and ask you to tell the Court and jury what that is.

A. This is an IBM run of sales to customers during '58, '59, '60 and '61 in the Denver, Los Angeles, Portland, Seattle, San Francisco, Salt Lake and Spokane markets for Pet-Ritz brand pies and Swiss Miss pies.

Q. How did you go about determining the customers?

A. We took the five largest customers in each year for all of the cities except Salt Lake City, and in Salt Lake City we took all of the sales to all customers.

Q. Was this study done under your direction?

A. It was, yes, sir.

Mr. Lamb: I should like to offer this in evidence.

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[fol. 890] Direct examination (continued).

By Mr. Lamb:

Q. Mr. Wohlhueter, did the invoices which you furnished to the statistical organization to make this tabulation include the lowest price, with the exception of the advertising allowances?

A. That is correct. It is the invoices less the off-invoice allowances, or all allowances except the advertising allowance, which is paid for by check.

Q. Mr. Wohlhueter, would you be good enough to tell the jury what an IBM run is? I think there has been a little bit of fuss about that. Will you express to the jury what that is?

[fol. 891] A. An IBM run is a statistical tabulation on an International business machine. This particular study we supplied the Statistical Tabulating Company with the invoices, and they reproduced the information as to customer name, city, flavor, the quantity off the invoice, the invoice number, the date of the invoice, the amount, the allowances, if any, and statistically listed them in an order, by cities in this particular instance.

Mr. Lamb: Your Honor, I offer this in evidence.

Mr. Alioto: No objection.

The Court: Received.

(The document marked Defendant Pet's Exhibit A-40 for identification was received in evidence.)

By Mr. Lamb:

Q. Mr. Wohlhueter, I would like to show you a series of charts marked Defendant Pet's Exhibits 41, 42, 43, and 44. I would like to ask you to tell the Court and Jury what they are?

A. Using the statistical tabulation and A-40, we analyzed the lowest invoice for each month for each of these cities. In this instance we have Los Angeles and Salt Lake City. We made a graph showing the lowest invoice for each month during '58, '59, '60, and '61 as listed by the tabulation.

Q. These lowest invoice prices are the Pet-Ritz prices?

A. These are Pet-Ritz prices, yes, sir.

Q. Are there any Swiss Miss prices?

A. No, there are not.

Q. Are there any Utah prices on these graphs?

A. Utah Pie Company, no, sir.

Q. So they are solely a Pet-Ritz exhibit?

A. That is correct.

Mr. Lamb: We're going to offer this, your Honor.
Mr. Alioto: I'd like a short voir dire on this.

Voir dire examination.

By Mr. Alioto:

Q. Mr. Wohlhueter, I just wanted to understand what you did here. If you had a series of invoices, for example, in the Los Angeles market—we'll say they were $4.00—

A. Yes, sir.

Q. —and you had ten invoices at $4.00, and then you had one at $3.50, do I understand that what you did on this study was to take that one $3.50 invoice and show that as the lowest?

A. That is correct.

[fol. 892] Q. So this does not attempt to represent the actual prices in the market, but the very lowest at a given moment?

A. That is correct.

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By Mr. Alioto:

Q. I take it that what you have just said applies to A-42, A-43, and A-44, as well as to A-41?

A. That is correct.

Q. And here again, this would not reflect, would it, any —I don't want to use the word "rebate"—you seem to recoil from it—this would not affect any check that was returned from your company to the purchaser in connection with the very invoice we're talking about?

A. No, sir. This is strictly off the invoice.

Mr. Alioto: Okay. We have no objection on that ground, and with that understanding.

[fol. 893] The Court: Received.

(The exhibits marked Defendant Pet's Exhibits No. A-41, A-42, A-43, and A-44 for identification were received in evidence.)

By Mr. Lamb:

Q. Mr. Wohlhueter, the check—are you referring here to advertising allowances that are earned for that check?

A. That is right, based on performance.

Mr. Lamb: If your Honor please, I'd like to show these charts to the jury. This chart of the Pet-Ritz prices, in the black line are the prices of the in-Salt Lake City. This line here shows that the prices of Pet-Ritz were below the Los Angeles price on this occasion and on that occasion. The brown line are the Los Angeles prices. So there were only two occasions when Los Angeles—or when Utah was lower than Los Angeles.

Now, here again we have Denver in contrast with Salt Lake. See the same line. This reason for the break here is there were no sales at the particular point. And this again, of course, is the Denver price, which you can see is slightly lower than the Salt Lake price.

The same thing is true with respect to San Francisco. The black line is Salt Lake, and the red line is San Francisco, and you can see that the San Francisco prices were slightly lower than the Salt Lake prices.

And finally, a chart showing the Spokane prices in comparison with the Salt Lake prices, which shows Pet at the beginning, the green line was higher, and then it dropped below. You can see the black line, which is Salt Lake, and again, no sales here. In the main, it's either equal to or below the Salt Lake price. As was indicated on voir dire, this information was taken directly from the invoices, as distinguished from price lists, off list invoices, or price announcements of any kind.

Were these received in evidence, your Honor?

The Court: Yes.

By Mr. Lamb:

Q. Mr. Wohlhueter, I show you Pet's Exhibit A-45 for identification and ask you what that is.

A. This is a listing of the lowest invoice prices in the Salt Lake City market for apple pies, for Pet-Ritz, Utah Pie Company and Swiss Miss products.

[fol. 894] Q. Who prepared this schedule?

A. I did.

Q. From what documents did you get the data?

A. Again, this was from the I.B.M. run of the Pet Milk Company and the I.B.M. run and the Utah Pie invoices for the Utah Pie Company.

Q. Now, I notice a notation over here under Swiss Miss. You have a column called "Per Invoice," and then you have a column, "Adjusted by 48 cents." Where did you get the 48 cents?

A. That is a figure of one cent per ounce per pie for the difference in weight between a Swiss Miss pie and the Utah Pie and the Pet-Ritz pie, 24-ounce pies.

* * * * * * *

Voir dire examination.

By Mr. Alioto:

Q. Do I understand, Mr. Wohlhueter, that here again in the so-called lowest prices in the Salt Lake City—in Salt Lake City on apple—that here again, your price does not reflect any checks that you paid back to these accounts?

A. That is—

Q. By way of advertising allowances?

A. That is correct.

Q. On the other hand, the invoices at the Utah Pie Company in most instances do reflect, do they not, that advertising allowance right on the face of the invoice?

A. It has a ten cent allowance. I don't know what the allowance is for.

Q. But in any event, it's right on the face of the invoice?

A. The ten cent allowance is, yes.

Q. So obviously, the exact comparison would be to deduct your advertising allowances from this exhibit, wouldn't it?

A. When I was in court the other day, I heard Mr. Rigby testify—I thought that was a volume allowance he was referring to, the ten cents. I can't—I'm not attempting to identify the Utah allowance.

Q. Okay.

A. It's just the ten cents.

• • • • • • •

[fol. 896] The Court: Received.

(The exhibit marked Defendant Pet's Exhibit No. A-45 for identification was received in evidence.)

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I offer this in evidence, your Honor.

[fol. 897] Cross examination.

By Mr. Alioto:

Q. Again, Mr. Wohlhueter, if you'll bear with me—I haven't seen these before this morning—first of all, let's talk about the exhibit just read to the jury. That's A-45. It is a fact, isn't that correct, that until the $2.75 price in June of 1961 about which we've heard a good deal of testimony, that until the $2.75 price, the Swiss Miss price is always below the price of the Utah Pie Company; that's correct, isn't it?

A. That is correct.

Q. Now, then, you say you made some adjustment in the Swiss Miss price, and I frankly don't understand the standard you used in adjustment, Mr. Wohlhueter. Would you be good enough to explain that for me, please?

A. It is just a one-cent-an-ounce figure that I understand that the trade has picked up as a value for the difference between the various sized pies, weight pies, I should say.

Q. In other words, that one cent an ounce is a figure that you don't know anything about so far as trade accept-

ance is concerned? You have that on hearsay from somebody?

A. That is correct.

Q. And on the basis of that hearsay, then, you made the adjustment for one cent an ounce?

A. That is correct. It is not a cost difference, cost study difference.

Q. Now, you know, don't you, that the cost difference is a lot less than one cent an ounce, don't you?

Mr. Lamb: Mr. Alioto, may I see the witness.

A. I doubt that there is a 48-cent difference in cost, production cost, between a Swiss Miss and a Pet-Ritz pie.

Q. You say you doubt, Mr. Wohlhueter. You have made an actual study on it, so you know very well there isn't don't you?

A. There are cost studies in evidence; if I could see them I could tell you.

Q. Fine. I think it would be interesting at this point. What cost study do you refer to?

A. Our standard costs.

Q. Standard costs. You referred to your standard costs, which is our Exhibit 30 in this case. On the basis of that, would you be good enough to tell us what the cost differential is between the 20-ounce pie and the 24-ounce pie. Do you want some paper to calculate that, Mr. Wohlhueter?

[fol. 898] A. In 1961 our standards on Pet-Ritz apple were $3.53 a dozen.

Q. Yes.

A. And the difference in our standards—or our standard for Swiss Miss for the same year is $2.50 a dozen, so that there is 1.03 a dozen difference between a dozen apple pies Pet-Ritz and a dozen apple pies Swiss Miss.

Q. That would be a difference than per ounce of how much? You used 48 cents here. You said 48 cents is higher than the cost differential.

A. In this case it is $1.03 difference per dozen.

Q. Are you telling me that the—

A. It is about two cents in this case.

Q. You say it is two cents a pound—two cents an ounce?

A. Per pie.

Q. Per pie?

A. Yes, sir.

Q. That would be, then, eight cents per pie?

A. Yes, sir.

Q. Eight cents per pie differential; on the basis of a dozen that would be 96 cents.

A. $1.03, yes, sir.

Q. A moment ago when you said you didn't think that 48 cents was the cost differential, you must have had some information you based that on?

A. I didn't have the cost figures in front of me. That is the reason I didn't want to be held to it.

Q. Mr. Wohlhueter, take a look at your Exhibit 60. That is a difference—a study made by you of the difference between a 22 and a 24, isn't it?

A. I think you have showed this to me sometime ago.

Q. Yes.

A. And I told you I was not familiar with this study; it was not made under my supervision.

Q. This study shows, however—of the Pet Milk Company—

Mr. Alioto: Excuse me, if your Honor please.

The Court: That is all right.

By Mr. Alioto:

Q. This study shows, doesn't it, that the difference between the 22-ounce and the 24 ounce per dozen—or is that per case?

A. That is per case.

Q. The difference between the 22 and 24 per case is only six cents, approximately six cents. That would be 12 cents per dozen. Now, if there is only a difference of 12 cents per dozen between 22 and 24, how can there be a difference of a dollar a dozen between 20 and 24?

[fol. 899] A. We never made this pie. This was before we ever got into making 22-ounce pies.

Mr. Lamb: If your Honor please, the Pet Milk Company never made a 22-ounce pie.

By Mr. Alioto:

Q. You mean this cost study that you made, when you made it, for the persons you made it, are you telling us now you believe is inaccurate?

A. Yes, sir. It was not based on actual experience, Mr. Alioto. It was a study.

Q. Let's see, who was the man who made that study for the Pet Milk Company?

A. Mr. Eads, Jim Eads.

Q. Jim Eads. Is he an accountant in your organization?

A. He is.

Q. Is he still with the organization?

A. He is, yes.

Q. And he made that study for Mr. John Bittner?

A. Yes, sir.

Q. And Mr. Bittner has what position in the organization?

A. At the present time he is sales manager for the Frozen Foods Division of the Pet Milk Company.

Q. Head man for the whole division?

A. Sales manager.

Q. Sales manager for the entire division?

A. Yes, sir.

Q. Now, in connection with this analysis, you have already stated that this does not reflect the checks that you paid back to the customer for advertising, or for performance.

A. Not on the Pet-Ritz, no, sir.

Q. At the time you sent the statistical study to the statistical organization, you did have those records available, didn't you?

A. I presume they are in our files, yes, I say.

Q. When you say you presume, you know you keep that kind of records?

A. I don't know back in 1958. At that time our San Francisco office was handling those, and I am not sure that they ever were shipped to St. Louis.

Q. This study purports to be a study from 1958 to 1961.

A. That is correct.

Q. You obviously had the records for these later years.

A. The recent ones, I am sure.

Q. Who made the decision not to send those records to the statistical study in order that we would have the invoice minus the actual check paid to the customer? Who made that decision?

A. The decision was not made not to do anything. What we wanted was a statistical tabulation of our invoices.

[fol. 900] Q. You would agree with me, Mr. Wohlhueter, that if it is true that the Utah Pie invoices reflect their advertising allowances that this study that has been placed in evidence is distorted to the extent that it doesn't actually reflect—

Mr. Lamb: I will object to the word "distorted."

The Court: Yes.

By Mr. Alioto:

Q. You would agree with me, wouldn't you, that if it is a fact that the Utah invoices do in fact reflect the advertising allowances, that your failure to reflect your own advertising allowances makes the study not comparable, doesn't it?

A. I was comparing invoices of the two companies for the same period of time.

Mr. Alioto: Would you mind reading my question to the witness again, please. Would you answer my question, please, Mr. Wohlhueter, and then you can say anything

you want. So long as I can get some kind of an answer to my question, then feel free to say anything you want.

(Question read.)

A. Yes.

By Mr. Alioto:

Q. Now, then, you were asked about—in these exhibits you were asked by counsel, and counsel read to the jury, Exhibits A-41 to A-44, the lowest invoice prices in particular areas.

Now, I take it from the study that you have made and from the fact that you have supervised this study, you were aware of the fact that from time to time between 1958 and 1961 that your company sold pies in Salt Lake City at a lower price than they sold them right next to the plant in California. That is true, isn't it?

A. There may be times. I can't state a specific time, no, sir.

Q. Well, you supervised this study, didn't you?

A. That's right, I did.

Q. You remember, don't you, that my statement is correct, namely, that from time to time during the entire period from 1958 to 1961, taking that as a period, that is, for the four years preceding the filing of this complaint, which was filed in September of 1961, the four years preceding that, it is true, is it not, that from time to time the prices in the Salt Lake area were lower than the prices right at the plant in California?

[fol. 901] Mr. Lamb: Your Honor, I object to the question. The best evidence is what is in the record. The price lists are there, the invoices are there now, and they speak for themselves.

Mr. Alioto: He puts this witness on the stand, if your Honor please, for the purpose of giving the impression that there is no price difference here, and I think this wit-

ness knows and I think he ought to be able to answer that.

The Court: Well, I think the records are the best evidence.

Mr. Alioto: All right. Let's take a look at the records then. It will take a little longer, if your Honor please, but we can get it hurriedly.

Will you mark this for identification.

(Plaintiff's Exhibits Nos. 116 and 117 were thereupon marked for identification.)

Mr. Alioto: We will offer into evidence, if your Honor please, at this time the invoices of the Pet Milk Company covering the period July to December, 1960, and they are invoices for—Plaintiff's Exhibit 116 are invoices involving Utah, Idaho, and California for that period of time. And Plaintiff's Exhibit 117 are invoices involving Salt Lake City, Montana, and Washington for the same period of time.

* * * * * * *

[fol. 902] Mr. Alioto: These invoices, ladies and gentlemen, the first one is 116. These are actual invoices for certain periods of time. The first period of time I am talking about is the period 1960, summer of 1960, and the fall of 1960, because we have had some testimony about that. These invoices go from July, 1960 to December, 1960, and these go from July, 1960 to December, 1960. These invoices in Exhibit 117 are invoices for Salt Lake City, Montana, and Washington. These invoices in 116 are invoices for Utah, Idaho, California—and California.

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(The documents marked Plaintiff's Exhibits Nos. 116 and 117 for identification were received in evidence.)

Mr. Alioto: Thank you, if your Honor please.

By Mr. Alioto:

Q. Now, the California invoices, for example, California invoices, the Peacock Dairies in Bakersfield, California, Bakersfield, California, on apple pie, 2.32; in Salt Lake City, the same month—the first I read was 7/14, July 14, 1960; the same month, July 5, 1960, in Salt Lake City it is 2.14; 2.14 as against 2.32.

By Mr. Alioto:

Q. I take it you know, Mr. Wohlhueter, that Bakersfield is very, very close to Fresno?

A. Yes, sir.

Mr. Lamb: We will stipulate that.

Mr. Alioto: Fine.

[fol. 903] By Mr. Alioto:

Q. And Fresno is where your plant is located?

A. Yes, sir.

Mr. Alioto: Against a California price of 2.32, we come over to Seattle, Washington, a price of 2.06. This is per case, so you double that difference in order to get the dozen, the dozen figures, Seattle, Washington. And in Salt Lake City, another customer, it is 2—this is a copy of the same year. Then in Montana it is also 2.02. So the California price of 2.32, a Salt Lake City price of 2.14, a Seattle price of 2.06, and a Montana price of 2.02, all in the month of July.

Now, the Montana price of 2.02 is in July, continued to July 15, 2.06, July 15 again of 2.06, July 15 to Associated Grocers for a larger quantity, 2.02, 2.02, 2.06 into August, 2.06—

Mr. Lamb: Mr. Alioto—

Mr. Alioto: September—

Mr. Lamb: Did you say those are for six pack and not twelve? Did you say to the jury this was for a half dozen rather than twelve?

Mr. Alioto: Yes, I said that, so that the difference would be double.

Mr. Lamb: That's right. Thank you.

Mr. Alioto: The difference between 2.02 and 2.32 in California is 30 cents, but that would be 60 cents a dozen.

Mr. Lamb: 4.60 against 4.04.

Mr. Alioto: Now, then, this Montana price continues at 2.02, and 2.06 in September; and October it goes up to 2.20, 2.24 in October, 2.24 in November, 2.20 in September.

Salt Lake City price—or the Seattle, Washington price, rather, 2.06 in July, 2.02 in July, 2.02 in July, 2.02 in July, 2.02 in July, 2.24 in August, 2.06 in August, 2.24 in August, 2.20 in August; in September, 2.20 in September, 2.20 in October, 2.18 in October, 2.24 in November.

In California, 2.32 in July, 2.32 for the period of July [fol. 99[illegible]] and August. Then it is 2.24 the end of July, 2.18 the end of July, 2.32 again, July, 2.32, 2.32, 2.18, 2.32, 2.32, 2.32 in August, 2.32 in September, 2.20 October, 2.32 again October, 2.32 September, 2.32 September, 2.32 September, 2.32.

And that is to Peacock Dairies and to Meadow Gold Dairies in Bakersfield, California, where you have the same price, the 2.32 price. That is in 1960.

By Mr. Alioto:

Q. Of course, these pies we are talking about are exactly the same pies, aren't they?

A. Yes, sir.

Q. Now, you remember there has been some considerable testimony about something that happened here in 1961, Mr. Wohlhueter—

Mr. Alioto: Before that, we will offer at this time, if your Honor please, the invoices for the same kind of pies, that is, Pet-Ritz, from January to June, 1961, January to June of 1961. We will offer those in evidence as exhibit next in order.

Mr. Schafer: What number?

Mr. Alioto: Plaintiff's Exhibit 118. We will offer as Plaintiff's Exhibit 119 the Utah-California invoices, a comparison between those invoices, between January and June of 1960.

We will offer as our next exhibit the invoices between Utah and California between July and December of 1958.

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Mr. Alioto: The invoices between 1960 and 1961 between Safeway, Utah, California, Colorado, and Montana at full truck price.

[fol. 905] We offer next the invoices between July and December, 1959, between Utah and California, they being the Pet invoices. They are offered in evidence.

Mr. Lamb: No objection, your Honor.

The Court: Received.

(The documents marked Plaintiff's Exhibits 118, 119, 120, 121, and 122 marked for identification were received in evidence.)

Herbert James Zimmerman, recall as a witness on behalf of the defendant Pet, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Zimmerman, I show you Pet's Exhibit A-46 for identification and ask you to tell me what that is?

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[fol. 907] Mr. Lamb: Your Honor, I offer Pet's Exhibit A-46, consisting of eleven pages, in evidence. I should have asked one further question.

By Mr. Lamb:

Q. Did you prepare these schedules from the actual books and records of the Utah Pie Company?

A. Yes, sir.

Mr. Alioto: If your Honor please, we have no objection to the statements of the plaintiff company, the Utah Pie corporation's statements, but I fail to see the relevance of whatever compensation was paid to the individual members, unless there's going to be a contention made that the compensation was unreasonable; and if so, of course, that would open up an interesting subject. So I would object to the introduction at this point of the compensation of the members of the Rigby family, unless that's the contention that they in effect are constructed dividends instead of wages. Then it would be admissible.

Mr. Lamb: There's a high degree of relevance in a small company—

Mr. Alioto: All right. If you want it in, Mr. Lamb, I have no objection. Now, you are specifically asking for their salaries? Okay. I have no objection to it.

The Court: It's received in evidence.

(The exhibit marked Defendant Pet's Exhibit No. A-46 for identification was received in evidence.)

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[fol. 909] Voir dire examination

by Mr. Alioto:

Q. These don't purport to show the profits from the frozen pie business, do they?

A. They show the profits of the company according to its books and records.

Q. Of the frozen pie business?

A. No, sir, not of the frozen pie, of the whole company.

Q. In other words, the entire company, the freshly baked pies and the frozen pies?

A. That's correct.

Q. In addition, do they even show the profits of the pie business, fresh and frozen?

A. As we computed them?

Q. Yes.

A. No, sir. They are taken from the books and records.

Q. Of course they don't. There are some capital gains in there that have nothing to do with the pie business, aren't there?

A. Yes, sir. These are shown—are in the evidence.

Q. As a matter of fact, would you get your profit and loss statement on which that is based. In 1958 your chart shows a profit of $7,000, $7,000 a year. Did they make $7,000 in the pie business?

A. They made $7,000 in total.

Q. Isn't there a capital gain in there of approximately $12,000?

A. We specifically brought that point out earlier.

Q. Isn't there?

A. Yes, there is.

Q. There is a capital gain of $12,000 on property that is not related to sales of pies, isn't that correct?

A. It was previously, sir, but it wasn't in this year.

Mr. Alioto: Well, if that is the basis on which it was done, my objection again goes to weight. I have no objection to the introduction of the chart.

The Court: Received.

(The document marked Defendant's Exhibit A-47 for identification was received in evidence.)

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